Petition

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No. .....

IN THE

Supreme Court of the United States

October Term, 1981

THE O. HOMMEL COMPANY,

Petitioner,

v.

FERRO CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

At Nos. 80-2062, 80-2723

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Petitioner, The O. Hommel Company, prays that a writ of certiorari be granted to review an order of the United States Court of Appeals for the Third Circuit reversing a judgment of the United States District Court for the Western District of Pennsylvania entered in favor of petitioner and against respondent, Ferro Corporation, upon a jury verdict.

QUESTIONS PRESENTED FOR REVIEW

1. Are the proscribed effects of price discrimination in a primary line case under the Robinson-Patman Act of 1936 to be confined to those stated in the Clayton Act of 1914?

2. Does the Robinson-Patman Act deny protection to a primary line competitor because his market is nationwide or because his losses decrease during the period covered by the action?

3. May a jury consider the relationship between a discriminator's prices and his costs in determining his predatory intent?

4. When a judgment entered on a verdict leaves open only the amount of statutorily required attorneys' fees, is the time for filing a motion for judgment notwithstanding the verdict postponed?

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OPINIONS OF THE COURTS BELOW

The District Court for the Western District of Pennsylvania on June 21, 1979 denied the motion of Ferro Corporation, respondent, for summary judgment: 472 F.Supp. 793. The opinion is printed in the appendix at page 1a.

The District Court on November 13, 1980 denied Ferro's motion for judgment notwithstanding the verdict. The opinion is printed in the appendix at page 6a.

The Court of Appeals for the Third Circuit on September 2, 1981 reversed the judgment of the District Court, one judge dissenting: 659 F.2d 340. The opinions are printed in the appendix at page 25a.

The Court of Appeals on September 23, 1981 denied the petition for rehearing filed by The O. Hommel Company, petitioner, three judges dissenting. The order is printed in the appendix at page 78a.

JURISDICTION

The order of the Court of Appeals was entered on September 2, 1981, and a petition for rehearing was denied on September 23, 1981, so that this petition for certiorari is filed within 90 days. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTE

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a):

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them....

The complete text of Section 2(a) is printed in the Appendix at page 79a.

STATEMENT OF THE CASE

The O. Hommel Company* ("Hommel"), the coatings division of Ferro Corporation ("Ferro"), and three other companies manufacture and compete throughout the United States in the sale of porcelain enamel frits (chemical compounds used to produce coatings for steel). Hommel brought suit against Ferro for discriminating in price from 1973 through 1977 in violation of the Robinson-Patman Price Discrimination Act in favor of certain customers with the result that neither Hommel nor any of the other manufacturers could compete with Ferro for the trade of these favored customers.

From 1966 through 1977 Ferro sold frits to General Housewares Corporation of Terre Haute, Indiana, at 65% of the price at which it sold them to other customers. One frit sold was designated by a different number when sold to unfavored customers; as to another frit, everything was identical. No competitive situation required either the discrimination or the deception, and, although Hommel tried, neither it nor any other competitor was able to make any sales to General Housewares during the five years involved in this action. Had it not been for the Ferro discount, the sales manager of General Housewares would have given Hommel one-third to one-half of its business.

Ferro sold a frit to Briggs Manufacturing Company of Knoxville, Tennessee during 1974 through 1977 at 85% of the price at which it sold the same frit, under a different number, to many other customers. It gave Briggs a secret additional advantage of maintaining price for a year. As a result, Hommel lost the Briggs

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*Hommel has no parent company, subsidiary, or affiliate.

business it had previously enjoyed, and neither Hommel nor any other competitor was able to break this trade barrier.

And in 1976 Ferro sold 17 different frits in varying quantities to General Electric Company at an across-the-board 5% secret discount while all other customers for the frits involved continued to pay published prices. Again, competitors of Ferro were foreclosed from obtaining sales to General Electric.

Ferro admitted the price discriminations but sought to justify them by asserting that it sold to the favored customers above what it called its variable cost (p. 3a). The only evidence it offered was its direct manufacturing cost, which excluded not only overhead but also numerous items of selling and administrative expense which varied with the quantities produced (p. 60a). Ferro offered no evidence that the additional variable costs were recovered by its prices; Hommel offered evidence that Ferro's prices were lower than even Ferro's variable costs.

Upon submission of the case to the jury, a verdict was rendered in Hommel's favor on its claim for damages for business lost by Ferro's violation of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a). Judgment was entered on the verdict leaving open only the amount of the statutorily required attorneys' fees. No motion for judgment notwithstanding the verdict or for a new trial was filed. After several hearings, the district court added the amount of attorneys' fees and other costs to the judgment. Only then did Ferro file a motion for judgment notwithstanding the verdict, and, after its denial both as untimely and on the merits, appealed. A panel of the Court of

Appeals for the Third Circuit, with one judge dissenting, reversed and ordered that judgment be entered for Ferro. Hommel's petition for rehearing was denied, with three judges dissenting.

The Court of Appeals held under the Robinson-Patman Act that (a) it was not relevant that competition with Ferro was injured or destroyed; (b) Hommel was not protected by the Act because it sold its products in more than one geographic market; (c) substantial fluctuations in a competitor's business volume are to be ignored if the market share is the same at the beginning and at the end of the number of years involved; (d) sales below cost are not evidence of predatory intent; and (e) even predatory pricing is not anti-competitive if done in secret.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals has held that the Robinson-Patman amendment to the Clayton Act is not applicable in cases of primary line discrimination, contrary to FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960).

Section 2 of the Clayton Act of 1914 addressed only two anticompetitive effects. Under that Act, price discrimination was illegal "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . .": 38 Stat. 730.

In 1936 Congress sought to expand the Clayton Act so as to reach anti-competitive conduct evidenced by

injury to competitors. The Senate Judiciary Committee reported:

> "This clause accomplishes a substantial broadening of a similar clause in section 2 of the Clayton Act. The latter has in practice been too restrictive, in requiring a showing of *general injury* to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is in injury to *the competitor* victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower." (emphasis added) Senate Report No. 1502, 74th Congress, 2d Session, page 4.

To accomplish this result, Congress in 1936 enacted the Robinson-Patman Act, which added to the two Clayton Act proscriptions a third prohibited effect:

> *"or to injure, destroy, or prevent competition with any person who* either *grants* or knowingly receives the benefit of *such discrimination* . . ." (emphasis added): 15 U.S.C. §13(a).

This Court recognized that the third effect could be felt by primary line competitors, ruling in *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 546 (1960):

> "While 'precision of expression is not an outstanding characteristic of the Robinson-Patman Act,' *Automatic Canteen Co. v. Federal Trade Comm'n*, 346 U.S. 61, 65, it is certain at least that §2(a) is violated where there is a price discrimination which deals the requisite injury to primary-line competition, even though secondary-line and tertiary-line competition are unaffected. The statute

> could hardly be read any other way, for it forbids price discriminations 'where the effect . . . may be substantially to lessen competition or tend to create a monopoly *in any line of commerce,* or to injure, destroy or prevent competition with any person *who either grants,* or knowingly receives the benefit of such discrimination, or with customers of either of them."

But in the case at bar, the majority of the Court of Appeals has decided this federal question in direct conflict with that decision and the clear text of the statute.

In quoting the "relevant part" of §2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §13(a)", the Court of Appeals omitted from its recitation of the proscribed effects the words added in 1936, statuting that the Act applied only (pp. 34a-35a):

> *"where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . ."*

Limiting itself to the 1914 words and to the 1914 legislative history, the court said that the "central issue is whether these price differentials substantially lessened competition or tended to create a monopoly" (pp. 38a-39a). It concluded only that the record did not show "any substantial lessening of competition or any tendency to create a monopoly" (p. 52a). It said nothing as to whether competition with Ferro had been injured, prevented or destroyed.

The omission of the third effect from the "central issue" is to negate completely the Robinson-Patman

1936 amendments. This makes it possible for a discriminator, so long as he does not have a monopoly position, to destroy a competitor so long as the general industry survives. The Court of Appeals has not simply misconstrued Robinson-Patman; it has repealed it and brought anti-trust law back to Clayton.

Had it looked for signs of injury to competition with Ferro, what would the Court of Appeals have observed? As to all three customers, there was ample evidence, as the dissenting judge pointed out, that Ferro selected them for the precise purpose of preventng its competitors from competing for those sales (p. 70a). As to the customer General Housewares, Ferro's 35% discrimination persisted throughout the 12 years that it supplied that customer. No Ferro competitor either caused the reduction or could vie with Ferro, during the five years covered by the lawsuit, for the patronage of General Housewares. Had Ferro confessed that its purpose in charging such prices was to prevent Hommel or any other competitor from obtaining any of the business of that customer, the Court of Appeals' analysis would still have protected it. And yet, this particular practice, total exclusion from the competitive arena of a substantial customer as a result of a deeply discriminatory persisting price, could be extended by Ferro to other purchasers without affecting anything other than the ability of Ferro's competitors to strive legitimately for that business. Such a result is proscribed by the Act.

Of the two Clayton Act effects, the Court of Appeals found there was no tendency to monopoly (which Hommel did not claim) and no substantial lessening of competition (as to which the dissenting judge disagreed). The third effect enacted by Robinson-Patman, the de-

struction of competition with Ferro, which could not be denied under the facts, was omitted by the Court of Appeals. If its decision is allowed to stand, as far as competition between the discriminator and his competitors is concerned, the Robinson-Patman Act is a nullity.

II

The Court of Appeals has held that price discrimination has no adverse effect on competition when the competitors sell in more than one geographic area, contrary to Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945), and when the gross profits of the competitors increase, contrary to Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

The Court of Appeals, relying upon the legislative history of the Clayton Act, stated (p. 44a):

> "The main evil at which §2 of the Clayton Act was aimed was geographic price discrimination. Congress feared that nationwide concerns would lower costs in one region with the intent of destroying local competitors thereby hoping to acquire a monopoly in that locality."

From this the court concluded that "non-geographic price discrimination does not present the same threat of economic harm at the primary level" (p, 46a). So, based on the legislative history of the earlier statute, the court ruled that a primary line competitive injury under the Act can only be sustained by "local competitors." As a result, since Hommel competed with Ferro nation-wide, even though it was shut out of competition

with Ferro for three customers in four cities, Hommel was denied the protection of the Act.

But any attempt to limit the protection of the Act to "local competitors" was squarely rejected by this Court in *Corn-Products Refining Co. v. FTC,* 324 U.S. 726 (1945), where Your Honors held that "the statute is not couched in terms of locality" and that "there is nothing in the words of the statute to support" such a distinction. Likewise, in *FTC v. Anheuser-Busch, Inc.,* 363 U.S. 536 (1960), this Court found price discrimination even though the regional breweries competed with Anheuser not only in St. Louis but also in other cities.

Geography is quite irrelevant. If it is illegal to destroy competition between A and B when they compete in the same city, why should it be any less illegal to destroy competition when A and B also compete in other cities? But the Court of Appeals condemns otherwise illegal discriminatory pricing only where "nationwide concerns would lower costs in one region with the intent of destroying local competitors" (p. 44a). In the frit industry, as in many others, there are no local competitors. Each of the five frit manufacturers sells throughout the United States. Under the Court of Appeals holding, all industries characterized by nationwide competition are exempt from claims of primary line injury under the Act.

By limiting the Robinson-Patman Act to a case where there are local primary line competitors, the court has immunized price discrimination in the multitude of cases where competitors of the discriminator compete in a number of cities. This reduces the Act to a shadow and permits it to apply only where the competitor of the discriminators sells in only one geographic area.

The Court of Appeals also says that there was "no actual competitive damage" to Hommel because it "retained its market share" and "its income and gross profits . . . increased between 1973 and 1977." (pp. 38a-39a). This is based on the fact that Hommel had 7% of the market in 1973 and 1977, although only 6% in the intervening years (p. 28a), and that it lost less in the 12th year following the commencement of the discrimination than it lost in the 8th (p. 27a). On this matter the Court of Appeals forgot the teaching of *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 702 (1967):

> "In this case the Court of Appeals placed heavy emphasis on the fact that Utah Pie constantly increased its sales volume and continued to make a profit. But we disagree with its apparent view that here is no reasonably possible injury to competition as long as the volume of sales in a particular market is expanding and at least some of the competitors in the market continue to operate at a profit."

Accordingly, the reasons given by the court majority for finding no adverse effect on competition are contrary to the clear rulings of this Court.

III

The Court of Appeals has denied a jury the right to consider, together with other evidence of predatory intent, the relationship between a discriminator's prices and his total costs of doing business, contrary to Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

The evidentiary value of figures showing a discriminator's costs as compared with the prices he charged his favored customers has been recognized by this Court

in cases of primary line injury under the Robinson-Patman Act. In *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967) this Court held (p. 696 n. 12):

> "... a jury would be free to ascertain a seller's intent from surrounding economic circumstances, which would include persistent unprofitable sales below cost and drastic price cuts themselves discriminatory."

At page 697 n. 12, this Court quoted with approval that:

> " 'a price reduction below cost tends to establish [predatory] intent' "*

and:

> "courts recognized the inferential value of sales below cost on the issue of intent."

Contrary to these principles, the Court of Appeals has denied that "any sales priced below *any* cost formulation could, without more, be deemed evidence of predatory intent" (p. 52a). This holding cannot be reconciled with the rule of *Utah Pie* that a jury may ascertain intent from sales below cost. This holding in itself is clear error.

In addition, the Court of Appeals ruled that a sale above marginal or variable cost "cannot be indicative of predatory intent" (p. 48a). Such variable cost excludes overhead, and that question was also considered in *Utah Pie*. There, in analyzing the evidence against Continental Baking Company, this Court noted (p. 698) that the defendant's Salt Lake City price "was less than its direct cost plus an allocation for overhead", and concluded (p. 700):

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*The Court used the word "predatory".

> "We think there was sufficient evidence from which the jury could find a violation of §2(a) by Continental."

Thus, this Court has ruled that evidence that a discriminator's favored customers are charged prices which do not include an allocation for overhead may be considered by a jury in determining whether or not predatory intent is present. With this conclusion, the Court of Appeals disagrees (p. 48a). It has substituted itself for the jury in weighing the effect of such a fact on the merits of the claim presented. This unsurpation was not countenanced by this Court in *Utah Pie* and should not be permitted to stand here.

Congress believed that discriminatory sales below fully allocated cost would be eliminated by the Act. The Judiciary Committee of the House of Representatives, in its 1936 report on Robinson-Patman, stated:

> "This [amendment] precludes differentials based on the imputation of overhead to particular customers, or the exemption of others from it, where such overhead represents facilities or activities inseparable from the seller's business as a whole." House Report No. 2287, 74th Congress, 2d Session, page 10.

We need not go as far as this standard because we need not say that a discriminating seller's failure to meet overhead calls for a directed verdict for his injured competitor. We do argue that when fully allocated cost is not recovered by a discriminatory sale, competitive injury can result and the jury can consider this factor.

When the Court of Appeals says that a sale at "above marginal cost . . . cannot be indicative of preda-

tory intent" (p. 48a), it is establishing an absolute rule of law that sales below variable cost cannot have the purpose of destroying competition. This amounts to crystallization into law of an economic theory as to which there was conflicting testimony. Such a rule is contrary to *United States v. National Dairy Corp.*, 372 U.S. 29 (1963). That case involved the same Robinson-Patman Act, where §3 made it a crime to engage in sales "at unreasonably low prices for the purpose of destroying competition": 15 U.S.C. §13a. The defendant, charged with violating §3 by "sales made *below cost,*" argued that this charge was unconstitutionally vague. This Court upheld the indictment, ruling as to "below cost" (p. 34):

> "Whether 'below cost' refers to 'direct' or 'fully distributed' cost or some other level of cost computation cannot be decided in the abstract."

So, if Ferro were here charged with criminal conduct in its discriminatory sales, it would not be able to defend on variable cost "in the abstract"; Ferro would have to have all the facts considered. We submit that it is anomalous to allow Ferro to offer as an absolute defense to a civil suit a sale above variable cost when this Court would not allow the same absolute defense to a criminal charge.

Further, the Court of Appeals substituted itself for the jury in stating that Ferro sold above variable cost (p. 52a). But, as the dissenting judge pointed out (p. 60a), the jury did not so find:

> "From the evidence the jury could conclude that Ferro's calculation of average variable cost included direct manufacturing cost, but excluded the cost of salesman's bonus for procuring the sale, the

cost of technical service to Briggs and General Electric, the expenses of the sales representative who serviced General Housewares, the cost of additional workmen's compensation insurance premiums and unemployment insurance contributions on additional payroll, and the cost of invoicing, bookkeeping, and collecting of the three accounts. Assuming the jury found that all these items were excluded from Ferro's calculation of average variable cost, it could conclude that Ferro's prices were below what would recapture all fixed costs and several variable costs, although above its average direct manufacturing cost."

Even on the theory of the Court of Appeals that, contrary to *Utah Pie,* sales below cost are not evidence of predatory intent "without more", there was plenty of "more" for the jury: the conflicting economic testimony as to the effect on competition of the discriminatory pricing; the price discrimination, continued for twelve years in the case of the customer General Housewares and four years in the case of Briggs; a discriminatory price 35% below the regular price; quantity discounts not justified by any cost saving; Ferro's previously repeatedly increasing discounts when Hommel attempted to meet Ferro; Ferro's superior financial ability to sustain a price war and any resulting loss; Ferro's confidential price list and sales of the same product to different customers under different numbers; the pretense that the identical products were different; the special agreement to maintain prices for a year regardless of market conditions; Ferro's customers not being free to discuss the deal; and sales below variable cost even on Ferro's own calculations.

One important item of the "more" evidence considered by the jury was secrecy. Ferro's price discriminations were kept secret by marking bags containing identical frits with different numbers (p. 41a) and by its customers' refusal to disclose the price and terms that Hommel had to meet. Rather than regarding this secrecy as a handicap to competition, the Court of Appeals condoned the price discriminations precisely because they were done in secrecy (pp. 41a-42a):

> "If Ferro had made known its lower prices, then Hommel and the other frit manufacturers would have had to meet those prices or risk losing customers. Such conduct by Ferro would be more likely to injure competition than did the discrimination here."

Again, at page 48a, the majority states:

> "This secrecy, as explained earlier, helps competitors to retain their customers without meeting the price-cutter's price."

Here the Court of Appeals failed to perceive that the very secrecy which "helps competitors to retain their customers" helps Ferro both to gain favored customers and to retain its unfavored customers. And if the secret discrimination's virtue is preservation of market share, it is the discriminating seller rather than competition which is being protected. If the secret discriminatory price becomes public knowledge, then and only then can there be healthy price competition for the customer.

And at page 48a, the majority holds:

> "Unless a customer knows of the lower predatory price, and can buy at that price, price discrimination will not likely have an adverse effect on competition."

Thus, the majority excuses even a "predatory price" provided it is secret. This excuse conflicts with *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696 n. 12 (1967), where this Court recognized the "dangers of predatory price discrimination."

We submit that the idea that secrecy excuses a violation of the antitrust laws is both novel and untenable. Secrecy is certainly not a statutory defense. And in an industry characterized by price competition, as is the frit industry, secrecy only helps the discriminator to increase his market share. Price competition for the favored customer is foreclosed.

What the Court of Appeals has ruled is that a jury in an antitrust cost may not consider the discriminator's costs, and particularly may not consider his total costs, that it may not choose between conflicting economic testimony as to the effect of the discrimination, that it may not consider the other evidence noted by the dissenting judge, and that it should regard secrecy as procompetitive. These rulings convert economic choices into a rule of law and usurp the functions of the jury, contrary to *Utah Pie*.

IV

The Court of Appeals has held that a judgment is not final for purposes of filing a motion for judgment notwithstanding the verdict if the judgment leaves open the amount of mandatory attorneys' fees. This holding is in conflict with two courts of appeals.

A motion for judgment notwithstanding the verdict must be filed, under Rule 50(b), within 10 days of the judgment. When a judgment settles all matters includ-

ing the right to attorneys' fees, but leaves open the amount of attorneys' fees, when does the 10 days start to run? On this question the Courts of Appeals are in clear and announced conflict. As pointed out in *Memphis Sheraton Corp. v. Kirkley,* 614 F.2d 131, 132 (6th Cir. 1980):

> "The question of whether a judgment, which includes an award of attorney fees against the opposing litigants but does not fix the amount of such fees is a final judgment, is one on which the courts of appeal are divided."

The Sixth Circuit in *Memphis Sheraton* holds the judgment to be final (p. 133):

> "We ally ourselves with those circuits which have held that a judgment is final for purposes of appeal although the amount of attorney fees have not been determined."

To the same effect is *Hidell v. International Diversified Investments,* 520 F.2d 519, 532 n. 4 (7th Cir. 1975).

The contrary view was taken by the Court of Appeals in the present case (pp. 52a-55a) and in *Croker v. Boeing Co.,* Nos. 80-1569, 1570 (September 30, 1981), where the court overruled prior decisions. To like effect are *Aetna Casualty & Surety Co. v. Giesow,* 412 F.2d 468 (2d Cir. 1969) and *Williams v. Ezell,* 531 F.2d 1261 (5th Cir. 1976). So, in the Second and Fifth Circuits, and now in the Third Circuit by virtue of prior decisions being overruled, the 10 days does not start to run until the attorneys' fees are quantified. The opposite is true in the Sixth and Seventh Circuits in applying the same Federal Rules of Civil Procedure. There should be uniformity.

The present case is a proper vehicle to eliminate the uncertainty. The jury verdict in Hommel's favor was announced on December 10, 1979. On December 11, 1979, judgment was entered by the trial court on the verdict. No issue was left open except the amount of the attorneys' fees required by statute: 15 U.S.C. §15. On January 4, 1980, Ferro filed an appeal with the Court of Appeals which was dismissed without prejudice upon Ferro's motion. On June 17, 1980, attorneys' fees were awarded to Hommel. On June 26, 1980, Ferro filed a motion for judgment notwithstanding the verdict, but did not dispute the amount of fees awarded.

If Hommel is correct in agreeing with the Sixth and Seventh Circuits, the Court of Appeals was without power to reverse and order the entry of judgment for Ferro: *Globe Liquor Co. v. San Roman,* 332 U.S. 571, 572 (1947). Nor could it grant a new trial unless "the record reveals a complete absence of evidence to support a jury's verdict,": *Jones v. Reliance Insurance Co.,* 607 F.2d 1, 4 (D.C.Cir. 1979). The present case did possess such record support as the dissenting opinion amply demonstrates (pp. 55a-77a). Thus, if Ferro's motion was not filed within 10 days of the judgment as specified by Rule 50(b), an affirmance was required.

The position of the Sixth and Seventh Circuits is right. There is no use in wasting judicial time on the amount of attorneys' fees if there is a possibility of the entry of judgment notwithstanding the verdict. Nor is it wise to delay consideration of the motion until the merits are no longer fresh in the mind of the court. The same considerations would apply to a motion for a new trial where it is particularly important that the judge remember his impressions as to the credibility of

witnesses. Accordingly, the conflict among the circuits should be resolved, and in favor of the proposition that a motion for judgment is proper and required when the merits are decided.

CONCLUSION

By ruling that under the Robinson-Patman Act the destruction of competition with the discriminating seller is irrelevant, that the Act applies only to discrimination in one geographic area, that a jury may not evaluate conflicting economic testimony, and that even predatory pricing is pro-competitive if done in secrecy, the Court of Appeals has left the Act without vitality. Certiorari—or even a reversal on the basis of the dissenting opinion—is needed to give effect to the clear intent of Congress.

Respectfully submitted,
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APPENDIX

APPENDIX A

Opinion of the District Court for the Western District of Pennsylvania at Civil Action No. 76-1299 Denying Motion for Summary Judgment

Plaintiff (Hommel) and defendant (Ferro) compete in the United States in the sale of frit, a basic ingredient in porcelain enamel and ceramic finishings. Plaintiff filed this antitrust suit against defendant alleging that Ferro violated §2 of the Sherman Antitrust Act, 15 U.S.C. §2, and the Robinson-Patman Amendment to the Clayton Act, 15 U.S.C. §13, by selling frit to certain customers below cost, discriminating in price between purchasers in the sale of frit "of like grade and quality," and granting illegal quantity discounts to certain customers to the detriment of competition in the frit industry. Ferro filed a motion for summary judgment on March 12, 1979. Comprehensive briefs were submitted by both parties and oral argument was heard on April 9, 1979. After careful consideration of the complex issues involved in this case, the court has determined that the motion must be denied.

Initially, the court notes that summary judgment should not be granted except on a clear showing that no genuine issue of any material fact exists. *Ely v. Hall's Motor Transit Co.,* 590 F.2d 62 (3rd Cir. 1978). Summary judgment is rarely appropriate in an antitrust case. *Poller v. Columbia Broadcasting System,* 368 U.S. 464 (1962). Cf. *Midwest Paper Products Co. v. Continental Group, Inc.,* Civil No. 78-1736 (3rd Cir., filed March 26, 1979).

I. Geographic Price Discrimination

At oral argument, plaintiff contended that paragraph 8(a) of its complaint contained a claim of geographic price discrimination at the primary line level.

(See transcript argument on motion for summary judgment at 25-28). Plaintiff alleges that Ferro uses the profits it makes from sales of frit in foreign markets in which plaintiff does not compete to subsidize the losses it incurs by selling frit at or below cost in the United States. In *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 402 F. Supp. 244 (E.D.Pa. 1975), petition denied, 521 F.2d 1399 (3rd Cir. 1975), a similar contention was rejected by (now Circuit) Judge Higginbotham who held that ". . . no cause of action arises under the [Robinson-Patman] Act unless both commodities involved in the alleged price discrimination are 'sold for use, consumption, or resale within the United States." 402 F. Supp. at 248. The court has not located any case which holds that §2(a) of the Robinson-Patman Act forbids price discrimination between domestic and foreign markets. Consequently, at trial Hommel will not be permitted to introduce any evidence supporting this theory of liability.

II. Sales Below Cost

In order to prove an attempt to monopolize under §2 of the Sherman Act, plaintiff must establish that the defendant had both a specific intent to monopolize the relevant market and the requisite market power to create a dangerous probability of success. *Times-Picayune v. United States,* 345 U.S. 594 (1953); *Coleman Motor Co. v. Chrysler Corp.,* 525 F.2d 1338 (3rd Cir. 1975). In order to establish a prima facie Robinson-Patman violation, plaintiff must show 1) that one or more of the purchases involved is "in commerce," 2) that there has been a discrimination in price between different purchasers of products of like grade and quality, and 3) that the effect of the price discrimination "may be substantially to lessen competition or tend to create a

monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . ." See *William Inglis & Sons v. ITT Continental Baking Co., Inc.*, 461 F. Supp. 410 (N.D. Cal. 1978). Where there is no direct evidence of an attempt to monopolize under §2 of the Sherman Act or a likelihood of injury to competition under Robinson-Patman, these elements may be inferred from a showing of predatory intent, and this intent, under both Acts, may be established by proof of predatory pricing. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *Janich Bros. Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977); *Pacific Engineering v. Kerr-McGee*, 551 F.2d 790 (10th Cir. 1977).

The major issue in dispute in this case concerns the nature of the predatory pricing evidence which will be admissible at trial to permit the inference of predatory intent. Plaintiff contends that evidence of sales below total cost is permissible while defendant argues that proof of sales below marginal cost, or at least variable cost,[1] is required before a jury may infer predatory intent.

The concept of predation in antitrust cases involves a temporary sacrifice of net revenues in the expectation of greater future profits once competition has been eliminated. Practical application of the term "predatory

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1. Marginal cost is the cost of manufacturing "the last unit." Variable costs are the costs that vary with changes in output, as distinguished from "fixed costs" which remain constant despite changes in output. Average variable cost is variable cost divided by the output. The use of variable cost as a substitute for marginal cost is not at issue in this case.

intent" and a determination of the type of pricing evidence which is admissible to permit an inference of such intent, however, has created difficulty for the courts. Various courts have wrestled with conflicting economic analyses in an attempt to fashion a workable formula for use in predatory pricing cases. In *Utah Pie v. Continental Baking Co., supra,* the Supreme Court identified the standard for distinguishing between predatory and competitive pricing as pricing below fully allocated cost. The Court defined "below cost" as "less than . . . direct cost plus an allocation for overhead." 386 U.S. at 698. Ferro argues that the Court did not confront the pricing issue squarely in Utah Pie, that its reference to "below cost" pricing was an "offhand" or "isolated" comment, and that, therefore, its determination is not binding on this court. We cannot accept this interpretation. The decision by the Court of Appeals in Utah Pie, 349 F.2d 122 (10th Cir. 1965), distinguishes between the profit incurred before deduction for overhead and the loss reflected after overhead was considered. One issue before the Supreme Court, then, was whether overhead was to be considered in price discrimination cases, and the Court determined that it was.

The recent trend in the Circuits, however, has been to adopt a below marginal or variable cost test. *Janich Bros. Inc. v. American Distilling Co., supra; Pacific Engineering v. Kerr-McGee, supra; Hanson v. Shell Oil Co.,* 541 F.2d 1352 (9th Cir. 1976); *International Air Industries, Inc. v. American Excelsior Co.,* 517 F.2d 714 (5th Cir. 1975). Most of these cases make little attempt to distinguish Utah Pie. Generally, they rely instead on a law review article which first proposed this standard. Areeda & Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act," 88 Harv.L.

Rev. 697 (1975). Areeda and Turner's analysis, however, has not survived unscathed. See O. Williamson, "Predatory Pricing: A Strategic and Welfare Analysis," 87 Yale L. Rev. 284 (1977); Sherer, "Predatory Pricing and the Sherman Act: A Comment," 89 Harv.L.Rev. 869 (1976); Scherer, "Some Last Words on Predatory Pricing," 89 Harv.L.Rev. 901 (1976).

Although we recognize that the post-Utah Pie cases have almost unanimously rejected the Supreme Court's standard in favor of the Areeda and Turner test, and although evidence of sales below marginal or variable cost may be a more accurate economic indicator of predatory intent in some cases, in the absence of the acceptance of this theory by the Third Circuit and in the face of Utah Pie, we are not prepared to foreclose plaintiff from presenting evidence of sales below total cost.

In some circumstances, of course, sales below total cost may enhance competition even though a particular competitor may be injured. Such a result would be consistent with the goal of the antitrust laws. In other circumstances, however, sales below total cost could permit an inference of monopolistic or predatory intent. A determination of this issue cannot be made on a motion for summary judgment; it must await a full trial on the merits.

For the reasons set forth in this memorandum opinion, defendant's motion for summary judgment will be denied and plaintiff will be permitted to offer evidence of sales below total cost at trial. An appropriate order will be entered.

WILLIAM W. KNOX
U.S. District Judge

Dated: June 21, 1979

APPENDIX B

Opinion of the District Court for the Western District of Pennsylvania at Civil Action No. 76-1299 Denying Motion for Judgment Notwithstanding the Verdict

This case, since jury verdict, has run into more than the usual number of complex problems. Immediately after the verdict on December 11, 1979, the court entered judgment upon the special verdict for treble damages totalling $4,500,000 against the defendant under the antitrust laws, 15 USC 15.

The court's order further provided:

> "IT IS FURTHER ORDERED that the plaintiff submit a claim in proper form and detail as required by the decision of the Court of Appeals of this Circuit for counsel fees, if the same is to be submitted, within 20 days from the date of this order."

The plaintiff did file a petition for counsel fees and costs on which hearings and arguments were held culminating in a lengthy opinion and order dated June 16, 1980, which was entered as a supplementary judgment order.

Meanwhile the case had been delayed because the defendant, out of an abundance of caution, filed an appeal from the original judgment order with the circuit at No. 80-1141 seeking a clarification order with respect to the jurisidictional status of the instant appeal. The Court of Appeals on February 4, 1980, entered an order reading as follows:

> "The foregoing motion to dismiss the appeal is granted without prejudice to lodging a fresh appeal in all issues presented in the district court pro-

ceeding after a decision is rendered in the attorney's fee question."

The court thereupon proceeded with the attorney's fee question with the resultant supplementary judgment order of June 16, 1980, directing that the judgment order of December 11, 1979, be modified by increasing the amount thereof as follows:

> "In addition to the amount of $4,500,000 for damages incurred, plaintiff is also entitled to an award of counsel fees in the amount of $447,158, plus an award for out of pocket expenses incurred in the amount of $36,192.48, making a total for attorney's fees and costs of $483,350.48. The grand total of all amounts awarded therefore is $4,500,000, plus $483,350.48, making a grand total of $4,983,350.48 for which final judgment is hereby entered in favor of plaintiff and against the defendant."

This was then followed by further appeal on July 15, 1980, at No. 80-2062, which resulted in an order in the circuit undated according to the copy received by this court but received here on July 29, 1980, which reads:

> "On motion of the parties, IT IS ORDERED that the above captioned case be remanded to the United States District Court for the Western District of Pennsylvania for disposition of all pending motions. The Court of Appeals for the Third Circuit, however, retaining jurisdiction."

Under this as we understand it, we should address ourselves to the pending motions. One of these involved a motion filed by the plaintiff on July 25, 1980, to amend findings of fact. In this the plaintiff asked to have Finding of Fact No. 3 in connection with attorney's fees amended. This finding originally read as follows:

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> "I find that the appropriate hourly rates for plaintiff's attorneys' services are the 'recommended' rates fixed by the firm of Buchanan, Ingersoll, Rodewald, Kyle & Buerger for the attorneys involved, in view of the fact that those rates prevail in the firm's billings for all but its impecunious or charitable clients, and that those rates are charged by the firm in 90% of its billings, and in view of the professional standing and experience of the firm and the attorneys involved, and rates prevailing in Pittsburgh for comparable firms."

This motion was occasioned by the fact that the court in original Finding No. 3 mentioned that the rates charged by the firm which should be used in making the calculations in the fee petition were the "recommended rates fixed by plaintiff's law firm . . . and that those rates are charged by the firm in 90% of its billing." It appears that this 90% did not enter into the calculations resulting in the billing in the determination of counsel fees and costs as per the order of June 16, 1980. We shall first address ourselves to this question.

(A) AMENDMENT OF FINDINGS RE COUNSEL FEES

The original opinion on counsel fees found that charged hourly rates should be made in accordance with the recommended rates. The court had reduced the amount claimed. $368,748, by 4% to $353,322 for time spent on claims under Sherman Act Section 2 and a further 5% representing time spent on dropped claims.

It was pointed out in the opinion of June 16, 1980, at page 13 that Judge Dumbauld of this court in dealing with a previous claim for counsel fees by this same law firm had held that the recommended figure is that

which the firm would ordinarily charge in such a case and was the one to be used in determining the lode star. This court also held that the recommended rate was the proper rate. As was pointed out the fact that it may not have been collected in all instances and that a lower amount was paid by the plaintiff in the interval had nothing to do with this. Under *Rodriguez v. Taylor,* 569 F.2d 123 (3d cir 1977), the lack of fees paid by a client does not necessarily relieve the defendant of its obligation to make payment of reasonable fees. Our finding that the recommended rate was to be the rate used in determining the lode start was supported by the testimony of Judd N. Poffinberger, Esquire, an outstanding Pittsburgh trial attorney who testified that the rate charged by Mr. Buerger and the other rates described in the claim for attorney's fees were reasonable. As we have heretofore noted, the figure of 90% was not used in calculating the amount but was only mentioned in passing as additional support of its reasonableness in view of the fact that it was charged in 90% of the cases. But whether it was charged in 90% or 60% of the cases has nothing to do with our determination that this is a proper fee for a complex case and one which would ordinarily be charged for the services of an outstanding trial lawyer such as Mr. David Buerger.

It would not be meaningful to attempt to analyze the findings of Mr. Patton, the managing director of Buchanan, Ingersoll, Rodewald, Kyle & Buerger, plaintiff's attorneys. He adopted the same position in his second affidavit and his findings indicated that 45% of the bills were charged at $85 per hour, 19% at $106, 26% at $127 and 10% at $150 per hour and it has been stated that these are the figures charged by this law firm in the case of complex litigation such as the one before us.

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This Circuit has previously stated that the hourly charge in the lode star should represent the charges usually made in complex litigation of this type. See *Baughman v. Wilson Freight Forwarding Corp.*, 583 F.2d 1208 at 1217 (3d cir 1978). This case holds that the quality of an attorney's work, his experience, knowledge, legal talent, and his expertise should be included in the hourly rate and used in calculating the lode star, which was done here.

The recommended rate for Mr. Buerger has been cleared as reasonable and the court finds it very reasonable under conditions existing in the legal profession in Pittsburgh in the period of time with which we are concerned. To attempt to analyze further the effect of billings by quartiles would only lead to generalized calculations with inexact figures which should not be used in this type of case. At best it would result in a generalized piece of guess work. It was commendable of Mr. Buerger to come forward with the information that certain testimony was inaccurate, but the result is not affect.

In view of the foregoing, we will grant the motion to amend findings of fact and direct, without affecting any order as to counsel fees and costs in any way, that Finding of Fact No. 3 be amended to read as follows:

> "I find that the appropriate hourly rates for plaintiff's attorneys' services are the 'recommended rates' fixed by the firm of Buchanan, Ingersoll, Rodewald, Kyle & Buerger, Professional Corporation for the attorneys involved, in view of the fact that those rates prevail [in the firm's billings for all but its impecunious or charitable clients, and that those rates are charged by the firm in 90% of its billings,] *within the firm for litigation of a com-*

plex nature like the present case, and in view of the professional standing and experience of the firm and the attorneys involved, and rates prevailing in Pittsburgh for comparable firms." (Matter in brackets deleted.)

We will turn now to the other motions which we were directed to dispose of by order of the Circuit.

(B) MOTION TO STRIKE MOTION FOR JUDGMENT NOV AND TO ALTER OR AMEND JUDGMENT

Following the entry of what the court regarded as a final judgment on June 16, 1980, after discussing the problem in a 29-page opinion awarding fees and expenses, the original judgment was amended by adding these items making a total of $4,983,356.48. Ten days thereafter on June 26, 1980, defendants filed a motion for judgment NOV and another motion to alter or amend judgment. The defendant filed a second appeal to the Court of Appeals and again on motion of the parties the Court of Appeals on July 29, 1980, entered the order quoted on page 2. This cleared the way for pending motions. On July 325 1980, the plaintiff had filed a motion to amend findings with respect to fees on the grounds it had been discovered that a certain statement in a finding of fact was not accurate. Arguments on all these motions were held July 30, 1980, and thereafter further materials have been submitted.

The plaintiff also filed on July 3, 1980, a motion to strike the motions for judgment NOV and motion to amend as being untimely filed under the provisions of Rule 50(b) and 59(e). We must therefore make reference again to the calendar of events in this case: December 10, 1979, verdict $1,500,000 for plaintiff; December

11, 1979, court entered judgment in the amount of $4,500,000 including treble damages; the judgment order further directed plaintiff to submit claims for costs and attorney's fees which were duly filed on December 18, 1979; on January 3, 1980, the first argument and hearing was held with respect to fees and costs; January 3, 1980, defendant Ferro appeals to the Third Circuit; February 4, 1980, Circuit dismisses appeal without prejudice to a fresh appeal raising all issues after decision on the question of counsel fees has been reached.

Thereafter, subsequent hearings were held in the lower court, briefs filed and the order of June 16, 1980, entitled "Supplemental Judgment Order awarding fees and expenses and amending the original judgment accordingly" was filed.

We must therefore turn first to the motion to strike the motion for judgment NOV and motion to alter or amend judgment.

The question before us therefore is: "When is a judgment not a judgment?". The rules are silent on this question and there seems to be a dearth of treatises or cases on the point here involved: Is it proper for a defendant to file a motion for judgment NOV under Rule 50(b) or a motion to alter or amend a judgment more than 10 days after the entry of the original judgment following a jury trial? *Cormier v. Rowan Drilling Co.*, 67 FRD 102 (E.D.La. 1975).

In this case, the judgment awarding treble damages was entered December 10, 1979. The judgment was not a final judgment because there still remained the fixing of counsel fees and costs. It is elementary of course that a final judgment is one where nothing yet remains to be

done and therefore this was not a "final" judgment. But it was a judgment upon a verdict. Six months following it, after lengthy and complex intervening proceedings with respect to attorney's fees and costs the defendant comes forward after these questions have been decided and files a motion for judgment NOV and to alter or amend judgment amounting to an attack upon the original judgment.

It will be noted that Rules 50(b) and 59(e) (which are substantially inter-related to Rule 59(b) relative to motions for new trial) do not say that the motion shall be filed no later than 10 days after a *final* judgment. They merely state 10 days after "judgment". Hence the problem presented here is whether the motions before us are timely. Under Rule 6, this court has no right to extend the time for filing a motion for judgment NOV, to alter or amend the judgment or for a new trial. All of these must be filed within 10 days of "judgment". This is judgment entered by the Clerk of Court under Rule 58 and is usually entered as a matter of form immediately upon reception of the jury verdict. Here we have, of course, a decision by the court upon a special verdict directing the Clerk to enter the judgment and prescribing its form which the Clerk did. At that time, the court will state that it was anticipated that the judgment was not final since we had to pass upon the question of attorney's fees and costs at a later time. Nevertheless everything else had been done. The court would not have been surprised, of course, and expected that motions for judgment NOV, new trial or to alter or amend the judgment would be filed within 10 days thereafter, i.e., by December 20, 1979 but no such thing occurred. The court was engaged for the best part of 6 months in pursuing the complex problems raised by

the petitions for counsel fees. Then, after a final judgment had been entered supposedly dealing with all the questions, the defendant comes forward with a motion for judgment NOV and to alter or amend the original judgment which had been entered on December 10, 1979. As a result, the court may have wasted a great deal of time on the question of counsel fees, because if a motion for judgment NOV or to alter or amend judgment is granted, then all this work resulting in a 29-page opinion was in vain. We note, of course, that the running of time to appeal is terminated by a "timely motion" and we also note that in the absence of a timely motion for judgment NOV under Rule 50(b), the appellate court has no power to enter a judgment NOV. *Cone v. W. Va. Pulp and Paper Co.,* 330 US 212 (1947); *Johnson v. NY & NH Rr Co.,* 344 US 48 (1952).

It may be assumed that the authors of the rules did not intend absurd results but this is the result where post trial motions of NOV, new trial and to alter to amend judgment can be filed 10 days after the entry of a judgment including counsel fees and costs, and over 6 months after judgment on the verdict, thus requiring the court to do the whole thing over again. It will be remembered that under FRCP 1 the rules "shall be construed to secure the just, speedy and inexpensive determination of every action". To delay until after the court has finalized everything by passing upon claims for counsel fees and costs and then permit a party to start over again attacking the verdict without any complaint in the meantime about the court's charge or other matters is certainly not the way to secure a speedy and inexpensive determination of an action. The court therefore holds that the judgment of December 10, 1979 was not a final judgment for the purpose of appeal but was

a judgment for the purpose of starting the time to run on motions for judgments NOV and to alter or amend judgment.

Lest we have misread the law and arrived at a wrong conclusion on this complicated question which apparently has no ready precedent or comment, we will, however pass upon the motions for judgment NOV and to alter or amend.

(B) THE MERITS OF THE MOTIONS FOR JUDGMENT NOV AND TO ALTER OR AMEND JUDGMENT

Having determined that the motions for judgment NOV and the motion to alter judgment filed June 26, 1980, were untimely filed, these motions should be denied on this ground alone. The court is of the opinion however that in case it should be determined that it was in error with respect to the untimely filings, a brief reference to the merits of these motions should be made.

The motion for judgment NOV claims that there was insufficient evidence of predatory pricing to justify submission of the case to the jury and also that there was insufficient evidence of damages.

The question of whether to follow the teachings of Professors Areeda and Turner in "Predatory Pricing and Related Practices under Section 2 of the Sherman Act", 88 Harvard Law Review 697, 733, 1975, has been constantly raised throughout the proceeding. It is the opinion of the court that the same was adequately dealt with in the opinion on defendant's motion for summary judgment filed June 21, 1979, and that little more need be said than what was said there:

> "In order to establish a prima facie Robinson Patman violation, plaintiff must show 1) that one or

more of the purchases involved is 'in commerce', 2) that there has been a discrimination in price between different purchasers of products of like grade and quality, and 3) that the effect of the price discrimination 'may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . .'. See *William Inglis & Sons v. ITT Continental Baking Co., Inc.*, 461 FS 410 (N.D.Cal. 1978). Where there is no direct evidence of an attempt to monopolize under Section 2 of the Sherman Act or a likelihood of injury to competition under Robinson-Patman, these elements may be inferred from a showing of predatory intent, and this intent, under both Acts, may be established by proof of predatory pricing. *Utah Pie Co. v. Continental Baking Co.*, 386 US 685 (1967); *Janich Bros, Inc. v. American Distilling Co*, 570 F.2d 848 (9th cir 1977); *Pacific Engineering v. Kerr McGee*, 551 F.2d 790 (10th cir 1977).

"The major issue in dispute in this case concerns the nature of the predatory pricing evidence which will be admissible at trial to permit the inference of predatory intent. Plaintiff contends that evidence of sales below total cost is permissible while defendant argues that proof of sales below marginal cost, or at least variable cost,[1] is required before a jury may infer predatory intent.

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1. Marginal cost is the cost of manufacturing 'the last unit'. Variable costs are the costs that vary with changes in output, as distinguished from 'fixed costs'

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"The concept of predation in antitrust cases involves a temporary sacrifice of net revenues in the expectation of greater future profits once competition has been eliminated. Practical application of the term 'predatory intent' and a determination of the type of pricing evidence which is admissible to permit an inference of such intent, however, has created difficulty for the courts. Various courts have wrestled with conflicting economic analyses in an attempt to fashion a workable formula for use in predatory pricing cases. In *Utah Pie v. Continental Baking Co., supra,* the "Supreme Court identified the standard for distinguishing between predatory and competitive pricing as pricing below fully allocated cost. The court defined 'below cost' as 'less than . . . direct cost plus an allocation for overhead.' 386 US at 698. Ferro argues that the court did not confront the pricing issue squarely in Utah Pie, that its reference to 'below cost' pricing was an 'offhand' or 'isolated' comment, and that, therefore, its determination is not binding on this court. We cannot accept this interpretation. The decision by the Court of Appeals in Utah Pie, 349 F.2df 122 (90th cir 1965), distinguishes between the profit incurred before deduction for overhead and the loss reflected after overhead was considered. One issue before the Supreme Court, then, was whether overhead was to be considered in price discrimination cases, and the court determined it was.

"The recent trend in the circuits, however, has been to adopt a below marginal or variable cost

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which remain constant despite changes in output. Average variable cost is variable cost divided by the output. The use of variable cost as a substitute for marginal cost is not at issue in this case."

test. *Janich Bros., Inc. v. American Distilling Co., supra; Pacific Engineering v. Kerr McGee, supra; Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th cir 1976); *Internatl Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th cir 1975). Most of these cases make little attempt to distinguish Utah Pie. Generally, they rely instead on a law review article which first proposed this standard. Areeda & Turner, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act', 88 Harv. L. Rev. 697 (1975). Areeda and Turner's analysis, however, has not survived unscathed. See O. Williamson, 'Predatory Pricing: A Strategic and Welfare Analysis', 87 Yale L Rev. 284 (1977); Sherer, 'Predatory Pricing and the Sherman Act: A Comment', 89 Harv. L. Rev. 869 (1976); Sherer, 'Some Last Words on Predatory Pricing', 89 Harv. L. Rev. 901 (1976).

"Although we recognize that the post-Utah Pie cases have almost unanimously rejected the Supreme Court's standard in favor of the Areeda and Turner test, and although evidence of sales below marginal or variable cost may be a more accurate economic indicator of predatory intent in some cases, in the absence of the acceptance of this theory by the Third Circuit in the face of Utah Pie, we are not prepared to foreclose plaintiff from presenting evidence of sales below total cost.

"In some circumstances, of course, sales below total cost may enhance competition even though a particular competitor may be injured. Such a result would be consistent with the goal of the antitrust laws. In other circumstances, however, sales below

total cost could permit an inference of monopolistic or predatory intent. A determination of this issue cannot be made on a motion for summary judgment; it must await a full trial on the merits."

It will be recalled that this suit was initiated by plaintiff, Hommel, a corporation, engaged solely in the manufacture and sale of "frit", against Ferro Corporation, a corporation with many plants engaged in the manufacture and sale of several lines of goods, including frit. The claim in this antitrust suit was that the defendant Ferro had violated Section 2 of the Sherman Antitrust Act, 15 USC 2, and also the Robinson-Patman Amendment to the Clayton Act, 15 USC 13, by selling frit to customers below cost, discriminating in price between purchasers in the sale of frit of like grade and quality, and by granting illegal quantity discounts to certain customers to the detriment of competition in the frit industry. Frit is a basic ingredient used in porcelain enamel and ceramic finishings and there are a limited number of firms in this country engaged in the manufacture and sale of this item.

In the motion for summary judgment, the court excluded evidence that Ferro uses profits it makes from the sale of frit in foreign markets, in which plaintiff does not compete, to subsidize the losses it incurs by selling frit at or below cost in the United States, according to the holding of Judge (now Circuit Judge) Higgenbotham in *Zenith Radio Corp. v. Matssushita Electric Industrial Co., Ltd.*, 402 FS 244 (E.D.Pa. 1975) petition denied 521 F.2d 1399 (3d Cir. 1975).

The jury found for the plaintiff only with respect to Robinson Patman allegations, 15 USC 13, and found against the plaintiff with respect to violations of Sherman Act No. 2 with respect to attempts to monopolize.

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It is the court's opinion that there is sufficient evidence under Robinson Patman to show predatory pricing in the evidence submitted to the jury. There was evidence that the General Electric Company was afforded a 15% discount below list price for sales of frit and it was stated that Hommel would not be considered as a supplier because of a special arrangement. The giving of this discount was never justified under cost justifications or the meeting of competition defense and the burden was on the defendant to show such defenses.

There was also evidence of sales to Briggs Manufacturing Company which were below manufacturing costs as well as total costs from witness Christopher of Price Waterhouse and Company. The court also finds that there was evidence from which predatory pricing could be inferred in the testimony involving Briggs Manufacturing Company, General Electric Company, General Housewares Company and Scio Pottery Company.

It is true that the Fifth and Ninth Circuits have concluded that the law is as stated by Areeda and Turner that there must be evidence of sales below marginal costs or direct manufacturing costs before a recovery can be had under Robinson Patman. On the other hand, the Tenth Circuit in *Pacific Engineering and Production Company v. Kerr-McGee Corp.*, 551 F.2d 790 (1977) has held to the contrary, as this court has held, that this is an important factor to consider, but that in the long run, when you have a plaintiff such as O. Hommel Company, engaged in the one line of manufacturing and selling frit, total costs must also be met. If you do not meet your total costs over a four-year period, you will be bankrupt. See testimony of Professor Dolde in this case and also the testimony of Mr. Christopher of Price Waterhouse.

The best exposition of this is contained in *Chillicothe Sand and Gravel Co. v. Martin Mariette Corp.*, 615 F.2d 427, (7th Cir. 1980) which held that the plaintiff had not produced sufficient evidence to measure up to the tests but nevertheless agreeing that the proper tests were not the simplistic ones advanced by Areeda and Turner which add a qualification not contained in the Act itself, but rather that other factors should be considered. In Chillicothe Sand and Gravel, the court said:

> "Areeda and Turner cite four major reasons in support of their proposition, stating that:
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> > "First, predatory pricing rules must take into account the proclivity of competitors to challenge a rival's price cuts, particularly when the rival is a larger firm. The threat of litigation may therefore deter legitimate competitive pricing. Second, pricing at SRMA [short run marginal cost] is the result in competitive markets and has the social welfare virtue of avoiding wasteful idling of current productive resources. Third, rules requiring price floors higher than SRMC will tend to preserve inefficient rivals or attract inefficient entry. Fourth, elimination or exclusion of rivals may in some instances cause long-run welfare losses that exceed the short-run gains from fuller use of capacity, but such long-run consequences cannot feasibly be incorporated into legal rules because they are intrinsically speculative and indeterminate.
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> "Areeda & Turner, Williamson on Predatory Pricing, 87 Yale L.J. 1337, 1339 (1978). These reasons have convinced many. Several circuits have adopted

Areeda & Turner's position and have stated that proof of below marginal price-costing is a requisite element of a prima facie case of predatory pricing. *International Air Industries, Inc. v. American Excelsior Co.*, . . .

"However, Areeda and Turner's position has not been universally accepted. Professor Sherer's critique concluded that 'it is unrealistic and even analytically wrong to apply a simple short-run price-cost rule for determining whether exclusionary pricing by a monopolist is socially undesirable and therefore predatory.' . . . Moreover, Areeda and Turner admit a willingness to allow damage to competition and the destruction, by one competitor, of equally efficient competitors as long as prices remain at or above marginal costs. Their reason for this willingness include an inability to arrive at a 'satisfactory' method of eliminating this risk and administrative case. 8 Harv. L. Rev. at 711. However, Section 2 of the Sherman Act makes no exceptions for cases involving administrative difficulty. Accordingly, while we accept the use of marginal or average variable cost as both a relevant and an extremely useful factor in determining the presence of predatory conduct, we are willing to consider the presence of other factors in our evaluation of whether or not CS&G has made out a prima facie case of monopolizing or atempt to monopolize. See Pacific Engineering, 551 F.2d at 797.

* * *

"In selling at a level which was above its average variable cost Martin Marietta acted in an economically rational manner, derived immediate

economic benefit from its sales, and did not engage in the 'deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition' Areeda & Turner, 88 Harv. L. Rev. at 698. See also Internal Air Industries [1975-2 Trade cases 60,447], 517 F.2d at 725. Although CS&G claims that its evidence of the relationship between Martin Marietta's costs and prices 'simply served to confirm' the predatory nature of Martin Marietta's conduct, this court finds no such confirmation in the evidence presented. Nevertheless, we turn to the other aspects of Martin Marietta's conduct through which CS&G attempts to prove predatory conduct."

In short, the court holds that whether this was a stable industry during the period in question and whether there was sufficient evidence for predatory pricing were matters for the jury to decide and the court determines that there was sufficient evidence to support the jury's verdict.

The court also holds that there was sufficient evidence to support the verdict for damages under *Bigelow Carpet v. RKO,* 327 US 251 (1946).

With respect to the motion to alter or amend by striking the award of treble damages, it is the defendant's contention that the holding of this court in this matter was such an earth shaking change in the law that a person should not be held to treble damages for not foreseeing such a change.

The court is unable to follow the argument by the defendant. There has been no earth shaking change in the law by the U.S. Supreme Court or by Congress

which would justify such a defense. As pointed out, while the Fifth and Ninth Circuit have upheld the arguments of professors Areeda and Turner, nevertheless, the Tenth and Seventh have not and as pointed out in Chillicothe, *supra,* there has been violent opposition to such a solution of the problem.

Further, the U.S. Supreme Court in Utah Pie Corp. clearly recognized that the simple test of sales below manufacturing costs was *not* the test to apply in Robinson Patman cases but rather the court defined below cost as less than manufacturing costs plus an allocation for overhead. As pointed out, a person can become bankrupt in a single line of business through failure to meet total costs just as easily as he can go bankrupt by attempting to sell below direct manufacturing costs. While death may not come as soon, it is still inevitable from the persistent bleeding.

The court instructed the jury fully on the questions of average variable costs or direct manufacturing costs and the other tests to be applied in this case and the jury found with respect to Robinson Patman that there was sufficient evidence.

For this reason the court upholds the jury verdict and denies the motion for judgment NOV and motion to amend judgment on their merits.

The motion to strike the award of treble damages if it is separate from the motion to amend judgment is likewise denied for reasons above set forth.

An appropriate order will be entered.

WILLIAM W. KNOX
U. S. District Judge

APPENDIX C

Opinion of the Court of Appeals for the Third Circuit at Nos. 80-2062, 90-2723 Reversing the Judgment of the District Court

Before: GIBBONS, HUNTER, and GARTH, Circuit Judges

Opinions Filed September 2, 1981

GARTH, *Circuit Judge.*

The O. Hommel Company brought suit against the Ferro Corporation, claiming that Ferro had violated §2 of the Sherman Act, 15 U.S.C. §2 (1976) and §2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §13 (1976). Between 1973 and 1977, Ferro sold porcelain enamel frit to three customers at a price lower than the price it charged other customers, and below its average total cost. The district court refused to enter a directed verdict for Ferro, and the jury found that Ferro had violated the Robinson-Patman Act (15 U.S.C.) §13, but not the Sherman Act. Ferro's subsequent motion for judgment notwithstanding the verdict on the Robinson-Patman count was denied.

We hold that there was insufficient evidence upon which to predicate Robinson-Patman liability, and thus we reverse and direct judgment be entered for Ferro.

I.

A.

Both Ferro Corporation and O. Hommel Corporation manufacture and sell two kinds of frit. Porcelain enamel frit is the basic ingredient in the coating of such

products as bathtubs, stoves, washing machines and refrigerators. These frits:

> are sold by plaintiff and defendant in conjunction, at times, with other frits and always with "additions" or "additives" of clay, electrolytes and other substances necessary to produce a porcelain enamel coating with the buyer's desired properties. The frits and additions or additives are assembled by the customer on a pre-determined formula in what is called a "batch" which is milled or ground with water to produce a porcelain enamel "slip". The slip is applied to the steel appliance part by spraying, dipping or flow coating. It is then dried and fused by heat which produces the porcelain enamel finish.

I App. at 55-56.

The companies also manufacture ceramic frit which is the basic ingredient in the glaze coating on products such as dishes. The jury's verdict on Robinson-Patman discrimination, however, was based only on sales of the porcelain enamel frit.[1] There is no major difference in the method of manufacturing the two types of frit (II App. at 413), and "generally speaking" the Ferro and Hommel production methods were the same. (II App. at 416)

Hommel has one plant in Carnegie, Pennsylvania. Frit (both porcelain enamel and ceramic) is its principal product, constituting 53% to 68% of sales. Its net worth is about $2.5 million, and its annual sales during the

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1. Although both types of frit, porcelain enamel and ceramic, are produced by the parties, and are the subject of the litigation, the issues on this appeal center on porcelain enamel frit, the only frit involved in Ferro's price discriminations. Hommel brief at 15.

1973 to 1977 period generally were in the range of $7,000,000. Hommel's income before taxes increased from $12,902 in 1973 to $256,615 in 1977. (IV App. at 212-16). Its gross profits on the sale of porcelain enamel frit were approximately $475,000 in 1973 and $540,000 in 1977, although when selling, laboratory, and general and administrative expenses were allocated, it showed net losses each year. (IV App. at 217-21). Its net loss, however, on these frit sales was $19,000 in 1977 compared to $259,000 in 1973. *Id.*

Ferro is a multi-national corporation with several divisions. Its net worth is about $150,000,000 and during the applicable period its sales averaged $334,000,000. Ferro manufactures frit in the United States at plants in Los Angeles, Nashville, and Cleveland. The alleged illegal sales all concerned frit manufacture at the latter two plants.

There are five manufacturer-sellers of porcelain enamel frit. Ferro is the largest producer and Hommel is one of the two smallest. Chicago Vitreous and Pemco, the next two largest manufacturers after Ferro, are both divisions of multinational conglomerates larger than Ferro. During the 1973-77 period, the years during which the alleged violations occurred, the sales of porcelain enamel frit (in pounds) were as follows (in 000):

	Industry	*Ferro*	*Chicago Vitreous*
1973	180,188	76,365	41,064
1974	144,243	61,995	32,905
1975	111,484	46,507	27,804
1976	125,936	51,067	30,915
1977	134,397	54,200	31,921

Appendix C.

	Pemco	*Hommel*	*Ingraham-Richardson*
1973	38,086	12,247	12,426
1974	31,628	9,278	8,437
1975	24,816	6,480	5,877
1976	30,907	7,615	5,432
1977	32,662	9,162	6,452

These figures resulted in the following market shares for sales of porcelain enamel frit:

	Ferro	*Chicago Vitreous*	*Pemco*	*Hommel*	*Ingraham-Richardson*
1973	42%	23%	21%	7%	7%
1974	43	23	22	6	6
1975	42	25	22	6	5
1976	41	25	25	6	4
1977	40	24	24	7	5

These figures do not include production by four concerns that produce porcelain enamel frit for their own production needs. (III App. at 617).

As can be seen from the production figures, during the 1973 to 1975 period the frit industry went into a steep decline from which it only partially recovered. The 1977 porcelain enamel frit production was less than 75% of the 1973 production. Ferro suffered a 29% loss of sales during the five year period, and its market share fell from 42% to 40%. Hommel had a 25% decline in sales during that same period, and a 7% market share in both 1973 and 1977. Only part of the decline in sales can be attributed to the 1974 recession. The porcelain enamel frit industry was facing increasing competition from other products. Paint and plastic products were being substituted for porcelain enamel frit. An increase in the

imports of products to which frit is applied, also hurt the demand for domestic frit.

Prices for frit generally rose during the 1973 to 1977 period (*See, e.g.,* IV App. at 393). All five of the firms had published price lists, but neither Hommel nor Ferro put all their price quotations on their published lists. (II App. at 341) Ferro also had a confidential, "special price list" for porcelain enamel frit. (IV App. at 15-22, Joint Exhibits 10-13). Prices varied with the type of porcelain enamel frit sold.

B.

Robinson-Patman liability was based on sales to three customers: General Housewares, Briggs, and General Electric. Porcelain enamel frit was sold to these customers below the published list price and below Ferro's average total cost (III App. at 484-488),[2] but above Ferro's average variable cost (which Ferro approximates as its direct manufacturing cost).[3] (Joint Exhibits 718, 719, IV App. at 392d-394).

The discriminatory sales made to General Housewares, Briggs and General Electric constituted no more than 5% of Ferro's national porcelain enamel frit sales during this 1973-1977 period, (Ferro brief at 7), and 2% of the domestic sales made by all frit companies during this period. *Id.*

General Housewares:

General Housewares manufactures pots and pans. In 1966 Ferro convinced General Housewares to discon-

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2. The requisite share of Ferro's Coatings Division overhead costs was allocated to determine average total cost.

3. *See* note 11, *infra,* for "cost" definitions.

tinue being a self-smelter of frit. Between 1973 and 1977 Ferro's frit sales to General Housewares declined about 40%, from 5,660,000 pounds to 3,650,000 pounds. As Ferro's marketing manager explained, in order to sell to a firm that was a self-smelter, as General Housewares had been, prices had to be very close to direct manufacturing costs. Although General Housewares had discontinued its production of frit, it could reestablish its smelting operation for less than $500,000. (III App. at 618). General Housewares was also very resistant to high frit prices because the domestic pot and pan business faced "tremendous foreign competition." (III App. at 617). Several American companies in the field—including at least one former Ferro customer—had gone out of business. Hommel had never sold any frit to General Housewares.

Briggs:

Briggs, a bathtub manufacturer, had been a Ferro customer for many years. In 1974, Briggs moved its plant and made Hommel its frit supplier because Hommel frit could be applied at a lower, cost-saving temperature. Quality problems developed at the new Briggs plant—the enamel began to flake off the steel. The president of Briggs testified that in searching for a solution to this problem, he decided to purchase frit again from Ferro, although he did not discontinue purchasing the groundcoat from the same supplier. Ferro thereafter supplied half of Briggs's frit requirements. The frit sold to Briggs was identical to other frit sold by Ferro to other customers under a different label and at a higher price. It was later determined that the steel in the Briggs tubs was faulty, and Briggs considered resuming the purchase of frit from Hommel. Briggs demanded

from Hommel a price competitive with Ferro's price, price protection for four, six or more months, and mentioned "something special" given to Briggs by Ferro—which turned out to be yearly price protection, assured by Ferro on a year-to-year basis. Hommel never offered any price protection and did not sell to Briggs after 1974.

General Electric:

In April, 1976 Ferro extended a 5% discount to General Electric on certain frits if General Electric would buy 6,000,000 pounds of frit during 1976. (IV App. at 362-364). General Electric annually purchased approximately 15,000,000 pounds of frit and had obtained 4,500,000 pounds from Ferro in 1975. General Electric only ordered 3,800,000 pounds of frit in 1976. Ferro unsuccessfully sought to rescind the 1976 discount and discontinued the discount for 1977 sales. Hommel sold no frit to General Electric in 1976 and 1977. Between 1973 and 1975 Hommel's sales to General Electric had averaged about 200,000 pounds a year. Hommel's loss of sales was due in large part, if not totally, to a change in coating materials made by two General Electric divisions. A Hommel employee did testify that he attempted to sell frits to General Electric but General Electric refused because of its arrangement with Ferro.

C.

Hommel charged Ferro with attempting to monopolize the frit industry in violation of §2 of the Sherman Act, 15 U.S.C. §2 (1976), and with price discrimination in violation of §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a) (1976). On June 21, 1979 the district court denied Ferro's motion for summary judgment, ac-

cepting Hommel's argument that sales below *total* cost in some circumstances could permit an inference of predatory intent. *O. Hommel v. Ferro Corp.*, 472 F.Supp. 793 (W.D.Pa. 1979). The court relied on *Utah Pie v. Continental Baking Co.*, 386 U.S. 685 (1967) in arriving at its decision. Citing *Zenith Radio Corp. v. Matsushita Electric Indus. Co.*, 402 F.Supp. 244 (E.D. Pa.), *aff'd mem.* 521 F.2d 1399 (3d Cir. 1975), it also ruled that Hommel could not introduce evidence demonstrating that Ferro had subsidized low frit prices in the United States through foreign sales.

The theory upon which the district court proceeded was explained in its charge to the jury:

> Where one seller sells below cost at a price less than direct cost plus an allocation for overhead, and a competing seller who is undercut is injured, the effect upon competition may be found to be traceable to such discrimination.
>
> You should, of course, in this connection consider the instructions I have given you previously as to a declining industry.

(III App. at 920-21). The judge's previous instructions, given on the §2 Sherman Act count, were:

> Now, I charge you that, where there is competition among members of a relatively stable industry, particularly where one of the members manufactures only the product in question, in this case, frit, porcelain or glaze, each manufacturer should charge prices which, over a period of, say, four years, as in this case, should equal the total cost; and, if a price less than the total cost has been effected or charged by the manufacturer, then, such pricing

> may amount to predatory pricing; that is, pricing intended to injure a competitor. Of course, to continue to charge less than total cost in this period of time could force one or more of the competitors in the frit industry into bankruptcy. You must make all your costs or you are going to go broke.
>
> * * * *
>
> However, were you to find that the market for frit was declining during the years 1973 to 1977, and that the frit industry was a declining industry, and there was a large amount of unused capacity, then, the prices charged by manufacturers need only equal the average variable costs; that is, the direct manufacturing costs.

(III App. at 912-913).[4]

The jury found Ferro liable under the Robinson Patman Act, *but not* under the Sherman Act. The jury calculated the damages to be $1,500,000, which the district court trebled to $4,500,000.[5]

On June 16, 1980, the district court, in a supplementary judgment order, awarded $483,350.48 in costs and attorney's fees to Hommel. Within ten days Ferro filed a motion for a judgment notwithstanding the verdict (it had moved for a directed verdict at the close of all the evidence, III App. at 802), and a motion to alter the judgment so as to strike all damages. Ferro also filed a

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4. Because of our disposition we have no occasion to address the charge as such, in this opinion.

5. Ferro filed a notice of appeal on February 4, 1980 from the jury verdict. That appeal was dismissed as being premature. *See* I App. at 132.

protective notice of appeal from the supplementary judgment order.

This court remanded the case for determination of all pending motions, jurisdiction of the appeal being retained. The district court found the post trial motions untimely and in the alternative denied them on the merits. It held that predatory intent could be found in Ferro's price discrimination and in Ferro's below total cost pricing. The present appeal resulted.

II.

In this case we are concerned with price discrimination at the primary or seller level. The Supreme Court wrote in *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 546 (1960) that "an independent and important goal of §2(a) is to extend protection to competitors of the discriminating seller."

In relevant part, §2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a), reads:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, *and where the effect of such discrimination may be substantially to less-*

en competition or tend to create a monopoly in any line of commerce . . .[6]

(emphasis added)

The price discrimination referred to in Section 2(a) is merely a price difference. *Anheuser-Busch,* 563 U.S. at 549. A difference in prices charged by a seller to different customers, for the same product, constitutes price discrimination.

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6. Sections 2(a) and (b) in their entirety read:

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly of indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit for such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods of quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differ-

Price discrimination is not illegal *per se.* At the primary level, the plaintiff must show that the "effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . ." *See Anheuser-Busch,* 363 U.S. at 542-43, 553; 4 Van Kalinowski, ANTITRUST LAWS AND TRADE REGULATION, §§22.08, 29-01[4] (1980); *Utah Pie Co. v.*

NOTE—(Continued)

entials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie cast of discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall pre-

Continental Baking Co., 386 U.S. 685 (1967); *Dean Milk Co. v. FTC*, 395 F.2d 696, 700 (7th Cir. 1968)[7]

In defining the scope of liability under the Robinson-Patman Act, the larger goals of antitrust law must be considered. The Supreme Court has cautioned us "that the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws." *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979). A court must be wary in imposing liability that would result in "price uniformity and rigidity." *Id.* at 80; *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953). Secret price discrimination may be the only effective means for a firm to undercut published oligopolistic price. *See* ABA Antitrust Section, Monograph No. 4, The Robinson-Patman Act: Policy and Law, Vol. I (1980) at 29. The Robinson-Patman Act is not to be used as a means to maintain artificially high prices. In defining the scope of Robinson-Patman liability, it must be remembered that vigorous price competition is a central goal of the anti-trust laws. See *International Air*

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vent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

7. Section 2(b), see not 5 *supra*, does state that once price discrimination has been shown, the burden of rebutting the *prima facie* case lies with the defendant. Yet the term "price discrimination" in §2(a) should not be considered synonymous with the term "price discrimination" in §2(b). Otherwise a mere price differential would establish a *prima facie* case, a result clearly at odds with the construction of §2(a). *See FTC v. Anheuser-Busch Inc.*, 363 U.S. 536, 542-43 (1960) (competitive harm is an element of a statutory violation).

Industries, Inc. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975) *cert. denied*, 424 U.S. 943 (1976). "A focus on detrimental effects *on competition*, rather than a concern with individual *competitors*, is fundamental to a reconciliation of the Robinson-Patman Act with overall antitrust policies." F. Rowe, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 130 (1962) (emphasis added).

There are two basic means of meeting the competitive injury requirement: (1) actual competitive injury shown by market analysis; and (2) predatory intent from which competitive injury may be inferred.

A.

It is not disputed in this case that Ferro sold porcelain enamel frit to three customers below the prices at which it sold that frit to other customers. The central isiue is whether these price differentials substantially lessened competition or tended to create a monopoly.

There was clearly no actual competitive damage in this case. The market share of Ferro dropped, while Hommel retained its market share. The market shares of Chicago-Vitreous and Pemco, both increased. There was thus no evidence of any trend to monopolization — nor was there evidence of a less competitive industrial structure. There was no collapsing price structure, a condition found to constitute competitive harm in *Utah Pie v. Continental Baking Co.*, 386 U.S. 685 (1967). The speculative possibility that Hommel may have increased its sales had Ferro not engaged in price discrimination, cannot constitute harm to competition within the meaning of §2(a). Even the most generous reading of the full record fails to disclose any competitive harm which

Hommel suffered (its market share remaining stable, and its income and gross profits on the sale of porcelain enamel frit having increased between 1973 and 1977), much less "detrimental effects on competition."

B.

Since there is no actual competitive harm that has been demonstrated in this case, our analysis must focus on whether there was evidence of Ferro's predatory intent from which competitive harm can be inferred. Predatory intent can be shown by two means: (a) by express evidence; and (b) by inference from "below-cost" pricing. This second means of proving predatory intent is known as the "double-inference" test. "From below-cost pricing, predatory intent is inferred; from the finding of predation, injury to competition is inferred." *Pacific Engineering & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 198 (10th Cir.), *cert. denied* 434 U.S. 977 (1977).

Initially, we must define predatory intent. The legislative history of the Clayton Act indicates that predatory intent is an intent to destroy a rival with the ultimate purpose of acquiring a monopoly in a particular locality. See H.R.Rep. No. 627, 63d Cong., 2d Sess. 8 (1914), S. Rep. No. 698, 63d Cong. 2d Sess. 2-4 (1914).[8]

More recent definitions of predatory intent focus on sacrificing present revenues with the purpose of achieving monopoly profits in the future. The Ninth Circuit

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8. Section 2 of the Clayton Act was of course later amended by the Robinson-Patman Act in 1936. The Robinson-Patman amendments, however, were principally concerned with secondary line competition. For a primary line case involving the issues presented to us here, the relevant legislative history is that of the Clayton Act.

has defined predatory pricing as pricing that indicates that a defendant was "foregoing present profits in order to create a market position in which it could charge enough to obtain supranormal profits and recoup its present losses." *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1358 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977). *See also, Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 856 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); Areeda and Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV.L.REV. 697, 698. The concept of predation under the Robinson-Patman Act does not differ from the Sherman Act concept of predation.[9] *See generally* Areeda and Turner, 88 HARV.L.REV. at 727.

Hommel claims that there was sufficient evidence of predatory intent upon which a jury could base liability. It points to what it considers to be direct evidence of predatory intent and asserts the double inference test

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9. It could be maintained that the jury's findings of liability or the Robinson-Patman claim was inconsistent with its finding of no liability on the §2 Sherman Act claim. In Janich Bros. Inc. v. American Distilling Co., 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978), the court stated that for price differentials threatening primary line competition, §2(a) of the Clayton Act as amended by the Robinson-Patman Act, has the same substantive content as §2 of the Sherman Act, 15 U.S.C. §2 (1976). The court consequently held that any error of the district court in directing a verdict for the defendant on the §2 Sherman Act claim was harmless, because the jury had found for the defendant on the Robinson-Patman claims. *See also,* Areeda and Turner. 88 HARV.L.REV. at 727. This view is not unanimous. It has been suggested that a §2 Sherman Act monopolization claim differs from a §2(a) Robinson-Patman claim, since §2 of the Sherman Act requires a

was correctly employed here—from the pricing below average total cost, the jury could infer predatory intent. We conclude, however, that there is no express evidence of predatory intent and that the use of any double inference test, on the facts of this case, was improper.

To be relevant, express evidence of predatory intent should demonstrate the alleged predator's intention of sacrificing present revenues with the hope of obtaining monopoly profits. Hommel's direct evidence of predatory intent stressed the secrecy of sales made by Ferro to Briggs, General Housewares, and General Electric. The prices of the frit that Ferro sold to these concerns were not published. Hommel emphasizes that identical frit was placed in different numbered bags and sold at different prices to other customers. This secrecy and possible deception, Hommel asserts, is evidence of predatory intent.

The secrecy here, however, cannot be viewed as evidence of predation. Keeping the "below-cost" sales to these three customers secret does not indicate that Ferro intended to drive Hommel out of business with the hope of obtaining monopoly profits. By keeping its prices secret, Ferro permitted Hommel to continue selling to Hommel's own customers at Hommel's higher prices. If

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NOTE—(Continued)
dangerous probability of success and a specific intent to control prices or destroy competition. *See generally* ABA Antitrust Section, Monograph No. 4, The Robinson-Patman Act: Policy and Law, Vol. I (1980). Since plaintiffs do not contend on appeal that the verdicts were inconsistent, and since our resolution of this case does not require us to meet this issue, we do not resolve whether Sherman Act liability is identical to Robinson-Patman liability for price differentials threatening primary line competition.

Ferro had made known its lower prices, then Hommel and the other frit manufacturers would have had to meet those prices or risk losing customers.[10] Such conduct by Ferro would be more likely to injure competition than did the price discrimination here. (*See infra* for a discussion of across-the-board versus isolated, non-geographic price discrimination).

Moreover, the price discriminations here could not be accomplished without secrecy. As Hommel admits, it is difficult to offer a product at a lower price to some favored customers without either offering the same lower prices to other customers, or risk losing their business, when the less-favored customers learn of the discounts. Additionally, as mentioned earlier, secret discount pricing may be the only effective means to undercut an oligopolistic price. We thus fail to understand why price secrecy is indicative of predatory intent, nor has Hommel called our attention to any cases that would explain that relationship.

Hommel also considers it highly significant that an outside economic expert witness for Ferro testified that because of the continuing excess capacity in the frit industry, some frit firm might be forced to halt production in the future. The expert was of the opinion that if demand did not increase, it would be the most efficient use of economic resources for one of the firms to leave the frit business. Not only do we find it difficult to accept the testimony by a non-Ferro employee at trial in 1979, as revealing Ferro's intent in setting prices in 1973-1977, but we regard that testimony as bearing no

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10. Of course, if Ferro made its prices public, there is a likelihood that Ferro would have been obliged to offer the lower prices to its other customers.

relationship to predatory intent. Nor are we persuaded that any of the other evidence presented by Hommel, constituted proof of predatory intent.

Having determined that no express evidence of predatory intent is revealed by this record, we turn next to Hommel's argument that Ferro by pricing below its average cost[11] has exhibited the predatory intent which §2(a) proscribes. Hommel, relying on *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967) and Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J., 284, 321-22 (1977), asserts that from the below-average cost pricing in this case, competitive harm can be inferred. Ferro counters, that since there is no actual competitive damage, none can be inferred, and in the alternative, that competitive harm can only be inferred from prices below marginal cost or average variable cost.[12] We agree with Ferro that on the

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11. "Average cost is the sum of fixed cost and total variable cost divided by output." Areeda and Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV.L.REV. 697, 700 (1975). Fixed costs are those which *do not* vary with changes in output, and variable costs are costs which *do* vary with changes in output. *Id.* Variable costs typically include such items as materials, fuel, labor directly used to produce the product, repair and maintenance, etc. Average variable cost is the sum of all variable costs divided by output and is by definition lower than average cost.

12. Marginal cost is the increment to total cost that results from producing an additional increment of output. It is a function solely of variable costs, since fixed costs, by definition, are costs unaffected by changes in output. Marginal cost usually decreases over low levels of output and increases as production approaches plant capacity.

facts of this case, the jury should not have been permitted to infer predatory intent from the evidence of Ferro's "below-cost" pricing.

The main evil at which §2 of the Clayton Act was aimed was geographic price discrimination. Congress feared that nationwide concerns would lower costs in one region with the intent of destroying local competitors thereby hoping to acquire a monopoly in that locality. *See* S. Rep. No. 698, 63d Cong., 2d Sess. 2-4 (1914); H. R. Rep. No. 627, 63d Cong., 2d Sess. 8 (1914). The House Report stated:

Id.

Areeda and Turner conclude that a price above reasonably anticipated short-run marginal cost is non-predatory. *Id.* at 733; III P. Areeda & D. Turner, ANTITRUST LAW, §711d at 153 (1978). Areeda and Turner deem pricing above marginal cost to be non-predatory because "[i]f a monopolist produces to a point where price equals marginal cost, only less efficient firms will suffer larger losses per unit of input..." Areeda & Turner, 88 HARV.L.REV. at 711. Marginal cost pricing also maximizes social welfare by avoiding the "wasteful idling of current productive resources." Areeda and Turner, *Williamson on Predatory Pricing,* 87 YALE L.J. 1337, 1339 (1978). *See also Northeastern Telephone Co. v. American Telephone and Telegraph Co.,* No. 80-7740, slip op. at 3275-76 (2d Cir. May 27, 1981); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.,* 615 F.2d 427, 431 (7th Cir. 1980). Where there is perfect competition a firm maximizes profits by continuing production until marginal cost equals the market price. Areeda and Turner, 88 HARV.L.REV. at 702. For a monopolist, however, an increase in output will reduce the market price and thus, "the incremental [marginal] revenue to the monopolist from selling an additional unit is the lower price received for that unit, minus the revenue lost for

Appendix C.

Section 2 of the bill . . . is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country . . . In the past it has been a most common practice of great and powerful combinations engaged in commerce — notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence — to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquir-

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selling all other units at the lower price." *Id.* at 703. A monopolist maximizes profit when marginal revenue equals marginal cost. *Id.* at 703, n.19.

Areeda and Turner use average variable cost as a substitute for marginal cost because average variable cost is easier to ascertain. When average variable cost is constant, it is equal to marginal cost, when average variable cost is declining, it is greater than marginal cost, and when average variable cost is increasing, it is less than the marginal cost. *Id.* at 718. Areeda and Turner would have a court presume that a price at or above average variable cost is lawful. P. Areeda and D. Turner, ANTITRUST LAW, §711d at 154 (1978).

> ing a monopoly in the particular locality or section in which the discriminating price is made. . . ."

Id.

The Senate bill expressed similar concerns. Congress believed that price discrimination in one locality would be financed by higher prices elsewhere. "Every concern that engages in this evil practice must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of the same class of commodities above their fair market value in other sections or communities." S. Rep. at 3.[13] Whatever the merits of this recoupment theory, it is clear that it only applies in a geographic price discrimination setting. The theory presupposes that there is a geographic market for the commodity where the concern engaging in such "evil" practices faces no price competition.

The implicit congressional belief that non-geographic price discrimination does not present the same threat of economic harm at the primary level is shared by current commentators. Areeda and Turner would not even prohibit selective price-cutting:

> 2. *Price Discrimination in the Same Geographic Market.* —
>
> If, as we have contended, a monopolist should be permitted to make a general price reduction so long as his price equals or exceeds marginal cost, we are unable to see a persuasive case for prohibiting

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13. As noted earlier, *see* note 8 *supra,* the 1936 Robinson-Patman amendments were almost entirely concerned with the effects of price discrimination at the secondary level.

selective price-cutting to retain or obtain particular customers. Selective price-cutting cannot possibly be more harmful to small competitors than a general price reduction to the same level.[54] And since any additional sale at a price at or above marginal cost does not decrease shortrun net returns, the necessary element of predation is missing.

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54. Selective price-cutting might, however, be more likely to occur than general price-cuts, since the monopolist's losses on selective reductions would be smaller.

Areeda & Turner, 88 HARV.L.REV. at 725-26. *See aso,* Van Kalinowski, *supra* at 29-94-95; Note, *Competitive Injury Under the Robinson-Patman Act,* 74 HARV.L. REV. 1597, 1610-11 (1961).

The theoretical evil that lies behind predatory pricing is that a large firm will engage in the illegal price-cutting tactics which Congress feared, thereby forcing smaller concerns also to cut their price, or risk losing all their customers to the initial price cutter.[14] If a price-cutter offers a lower price to only a few set number of firms, then its price schedule cannot attract customers from its competitors. Those competitors will be able to retain their customers, because their customers will not be able to receive the discount price given by the price-cutter. Thus, the competitors will not be forced to lower their prices to meet the price-cutter. This type of price discrimination would be difficult to maintain without secrecy because otherwise disfavored customers of

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14. The predator must have the capacity to meet the new demand. Areeda and Turner, 88 HARV.L.REV. at 718.

the price-cutter might demand equal treatment. This secrecy, as explained earlier, helps competitors to retain their customers without meeting the price-cutter's price. Unless a customer knows of the lower predatory price, and can buy at that price, price discrimination will not likely have an adverse effect on competition.

Moreover, an additional sale at above marginal cost will increase short run net returns. A seller faced with a choice of making a sale at above marginal cost but below total cost, or foregoing the sale, will choose to make the sale. Such a profit maximizing sale cannot be indicative of predatory intent. We are thus impelled to conclude that in a non-geographic selective discriminatory pricing case when actual competitive harm has not been shown, Robinson-Patman primary line liability cannot be imposed merely upon evidence of selective below-average cost pricing.

Utah Pie is entirely consistent with our analysis. In *Utah Pie,* national manufacturers of frozen dessert pies challenged the price of a small (18 employees, family operated), local dessert pie manufacturer, Utah Pie, by lowering prices in the locality where Utah Pie operated sold its products. The prices set by the national pie manufacturers were all below their prices in other regions, and there was evidence that many of the prices were below "cost" — a term which the Court, at one point, apparently defined as "less than . . . direct cost plus an allocation for overhead." *Utah Pie,* 386 U.S. at 698. The price of frozen pies, including those of Utah Pie, fell dramatically. Utah Pie's share of the local market fell from 66.5% to 45.3%. Utah Pie's sales, however, nearly tripled and its net income increased.

Upon this evidence, the Supreme Court, reversing the Court of Appeals, reinstated the jury's finding of liability against the national manufacturers. The Court held that the competitive harm requirement had been satisfied because: (1) The "drastically declining price structure" constituted actual competitive harm. *Id.* at 703. (2) There was evidence of predatory intent which bore "on the likelihood of injury to competition." *Id.* at 702 (footnote omitted). This predatory intent was shown by the defendant's charging lower prices in the Salt Lake City market, and apparently, though it is not made explicit, by pricing below average cost.

Utah Pie thus does not stand for the proposition that in a case such as the present one, which is a selective, non-geographic price discrimination case, pricing below average cost is sufficient evidence upon which a jury can infer competitive harm when no actual competitive harm has been shown. The Supreme Court did not indicate that the competitive harm requirement could be satisfied merely by a showing of below-average cost pricing. It only stated that "the existence of predatory intent might bear on the likelihood of injury to competition," *id.* (footnote omitted), in the context of a case where it also found actual competitive harm. When inferring predatory intent from "below-cost" pricing, the Court also emphasized that the defendants sold pies in the Salt Lake City market at a lower price than elsewhere in the United States. *Id.* at 690, 694, 698, 701. Therefore, even if *Utah Pie* would support the theory that predatory intent, and hence competitive harm, could be shown merely by below-average cost pricing, such a theory would only apply in a geographic price discrimination case.

Appendix C.

The Williamson cost theory[15] relied on by Hommel and apparently by the district court, does not convince us that in a selective price discrimination case, predatory intent can be inferred from below cost pricing. Williamson would have a court find pricing to be predatory if it is below average cost over a long term when there is a loose oligopoly and when demand is not declining. However, we do not read his analysis to extend to the selective price discrimination context presented in this case. Whatever the merits of the Williamson theory as it pertains to across-the-board predatory pricing, we have difficulty in relating that theory to the present circumstances, which involve no more than lower pricing for a limited number of customers. Indeed, although Williamson responds to the Areeda and Turner article, Williamson's analysis does not address that aspect of Areeda and Turner which would free selective price discrimination from regulation. Thus, we are forced to conclude that reliance on the Williamson formulation would be misplaced in a case such as this one where we are faced with selective price discrimination.[16]

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15. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis,* 87 YALE L.J. 284 (1977).

16. Williamson asserts that prices must be remunerative, foreseeing that if over the long run, a firm keeps its price of a product below average cost, it will not recover all its expenses. *Id.* at 321-22. This, of course, need not be the result in a selective price discrimination. There, even though below-average cost sales to a select number of customers may result in "losses" on those sales, the above-average cost sales made during the same relative period can result in a full recovery of costs.

Williamson also employs an average cost test because of the hypothetical situation where firms in the same industry have different technologies. One capital intensive firm may have high fixed costs, and low vari-

Appendix C.

Although we have discussed various economic theories as they have been urged upon us by the parties, we need not choose among them to conclude that in this case insufficient evidence existed to warrant submission of the Robinson-Patman claim to the jury. While we are inclined to accept the basic premise of the Areeda and Turner thesis that predatory intent may not be inferred from sales at or above average variable cost, in light of the issue that we must resolve here and the record which presents it, we need not declare our adherence to that or any other economic theory proposed. The record here discloses that Ferro's discrimination in prices caused no competitive harm. The selective price discrimination practiced by Ferro resulted in no gain in Ferro's market share. Indeed, between 1973 and 1977, Ferro's share of the market decreased. During that same period, Hommel retained its share of the market and its overall economic position improved. No express evidence of predatory intent appears in the record, and Hommel thus sought to draw inferences of predatory intent from Ferro's pricing, relying on Robinson-Patman cases which involved not selective price discrimination, but geographic price discrimination. Yet, here the record reveals that Ferro's price discrimination was dispersed throughout the national market. Indeed, the price discriminations which are the focal point of Hommel's action, were limited to

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able costs, while is competitors may have low fixed costs and high variable costs. The capital intensive firm may not be more efficient than its competitors, but may engage in predatory pricing (and drive out its competitors) by pricing above its average variable cost but below the average variable cost of its competitors. *Id.* at 321. *See also* R. Posner, ANTITRUST LAW, 191-93 (1976). We fail to understand how this justification applies when firms share the same technology, such as in this case.

three customers and affected only 5% of Ferro's national sales.

In such circumstances we have grave reservations whether any sales priced below *any* cost formulation could, without more, be deemed indicative of predatory intent because our review of the record shows it to be barren of any substantial lessening of competition or any tendency to create a monopoly[17] caused by Ferro's discriminatory pricing.

Thus, without relation to any particular cost formula, we are satisfied that no liability under Robinson-Patman was incurred by Ferro. If, however, we were to look to the Areeda and Turner thesis to which we have been attracted, it is evident that our conclusion in this respect would be buttressed, providing, of course, that Areeda and Turner would even apply their theory to a selective price discrimination case. 88 HARV. L. REV. at 725-26. We observe that the prices at which Ferro sold frit to General Housewares, Briggs and General Electric were all above, not below, average variable cost, which under Areeda and Turner could not lead to any inference of predatory pricing.

We conclude therefore, that "as a matter of law, the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." *Denneny v. Siegel,* 407 F.2d 433, 439 (3d Cir. 1969).

III.

Hommel contends that even if we find the evidence to be insufficient for a jury to find liability, we cannot en-

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17. No evidence exists that Ferro's pricing tended to create a monopoly. Indeed the jury decided otherwise by finding for Ferro on the §2 Sherman Act claim.

ter judgment for Ferro because Ferro moved for judgment notwithstanding the verdict out of time. According to Hommel, in this circumstance, we can only remand for a new trial. *See Johnson v. New York, New Haven & Hartford R.R.*, 344 U.S. 48, 54 (1952). Rule 50(b) of the Federal Rules of Civil Procedure provides:

> No later than 10 days ofter entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict.

Ferro moved for a judgment notwithstanding the verdict within ten days of the district court's Supplementary Judgment Order of June 16, 1980, which set the amount of attorneys' fees. It did not move for an NOV judgment within ten days of the jury verdict and the entry of judgment thereon.

We agree with both parties that "judgment" means final judgment. Rule 54 defines judgment as used in the Federal Rules of Civil Procedure as "includ[ing] a decree and any order from which an appeal lies." Rule 4(a)(4) of the Federal Rules of Appellate Procedure assumes that an NOV motion will be made after final judgment:

> (4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of

> the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

Rule 50(b) had been amended in 1963 to provide that the motion for a judgment NOV should be made within ten days of the entry of judgment, rather than ten days after the reception of the verdict, so as to be consistent with Rules 52(b) and 59(b). *See* Notes of Advisory Committee on Rule 50(b), 18 U.S.C.A. at 376 (1963). The First Circuit has held that "judgment" in Rule 59(b) means final judgment. *Warner v. Rossignol,* 513 F.2d 678, 684 n.3 (1st Cir. 1975). We thus conclude that entry of judgment should be construed as entry of final judgment.

A judgment is not final until attorneys' fees have been determined. *Richerson v. Jones,* 551 F.2d 918 (3d Cir. 1977). Hommel argues that *Richerson* was overruled by *De Long Corp. v. Raymond International, Inc.,* 622 F.2d 1135, 1138-39 n.3 (3d Cir. 1980). Yet a panel of this court cannot overrule a prior panel precedent. United States Court of Appeals for the Third Circuit, Internal Operating Procedures, Ch. VIII, §C (1978). To the extent that it is inconsistent with *Richerson, De Long* must be deemed without effect.[18] Since this judgment was not final until the order of June 16, 1980, which es-

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18. We also note that at the time the jury handed down its verdict. *De Long* had not been decided.

tablished attorneys' fees, Ferro's NOV motion was timely, and judgment for Ferro may thus be entered.

IV.

On the record before us, Ferro's below-average cost pricing to three of its customers has caused no competitive harm within the meaning of 15 U.S.C. §13 to the porcelain frit industry. Nor does the record disclose explicit evidence of any predatory intent from which competitive harm could be inferred. All Hommel has shown is selective below-average cost pricing to three customers of Ferro. This evidence falls far short of establishing that Ferro was sacrificing short-term profits in the hope that it would recoup monopoly profits. If, on this record, we were to sustain Robinson-Patman liability, we would be encouraging the vary price rigidity and uniformity which the Supreme Court warned us against in *Great Atlantic & Pacific Tea Co. v. FTC,* 440 U.S. 69, 80 (1979). Our holding would thus run counter to the broader policies of the antitrust laws. *Id.* at 80, n.13. Having concluded that evidence of competitive harm and evidence of predatory intent is lacking, we will reverse the district court and direct that judgment be entered for Ferro.

APPENDIX D

GIBBONS, *Circuit Judge,* dissenting:

Ferro Corporation appeals from an order denying its motion for a judgment notwithstanding the verdict returned by a jury in a suit by O. Hommel Company for damages resulting from price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. 15 U.S.C. §13(a). The standard for granting such a motion is the same as that for the

grant of a directed verdict. For that purpose there must be either a complete absence of proof on an issue material to the cause of action relied upon, or a complete absence of controverted fact issues on which reasonable men could differ. The motion may be granted only if, without weighing the credibility of the evidence, there can be but one reasonable conclusion. Moreover, it is not sufficient for the grant of a motion that the evidence be undisputed, so long as it is rationally possible to draw conflicting inferences from it on the material fact in issue. *Firemen's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178-79 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977); *Neville Chemical Company v. Union Carbide Corporation*, 422 F.2d 1205 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970). In considering the motion, both the trial court and this court must view the evidence in the light most favorable to the party which obtained the verdict, and must give to that party the benefit of all inferences supporting it which the evidence permits, even though contrary inferences might reasonably be drawn. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962). This standard of review, the narrowest in federal appellate practice, is required by the seventh amendment. *See Galloway v. United States*, 319 U.S. 372 (1943). In applying it we must determine, first, what are the material elements of the cause of action on which the jury returned a verdict, and second, whether from the stipulated facts and the evidence a reasonable jury could have found them.

A plaintiff seeking damages under Section 4 of the Clayton Act, 15 U.S.C. §15, must establish that the defendant violated one of the antitrust laws and must show damage to his business or property caused by that violation. Ferro contends that there is no evidence from which a jury could find either violation or injury to

Hommel's business or property. On violation, it contends further, that even if there is evidence from which the jury could infer the elements of a Robinson-Patman Act violation which were set out in the court's charge, the charge was erroneous as a matter of law. Reviewing the record by the appropriate standard of review, I am not persuaded that there is no evidence from which the jury could find the material elements of a violation as defined in the court's instruction. Moreover, that instruction is consistent with the interpretation of Section 2(a) announced by the Supreme Court. Finally, there is evidence from which the jury could find that Hommel lost profits as a result of Ferro's sales below cost to selected customers. Thus I would affirm.

I.

The stipulated facts establish that both Ferro and Hommel are manufacturers of an industrial raw material called frit, an ingredient in the enamel finish of bathtubs, lavatories, and major consumer appliances such as stoves, washing machines and refrigerators. This raw material is processed by the manufacturers of those products into a porcelain enamel "slip," which is applied as a coating, dried, and fused by heat to produce a porcelain enamel finish. Frit is also the basic raw material for the glaze coating on pottery products such as dishes, and both Hommel and Ferro manufacture frit for this use. Sales and shipments of both types of frit are in interstate commerce. Ferro, a multi-national, diversified manufacturer, has 65 plants throughout the world, and manufactures frit at 20 of them. It manufactures frit in the United States at plants in Cleveland, Nashville, and Los Angeles. Hommel's sole business is the manufacture and sale of frit and other materials needed to pro-

duce a glaze product. It has one plant in Carnegie, Pennsylvania. Sales involved in this case were, with one exception, to manufacturers of porcelain enamel. Five manufacturers in the United States produce frit for porcelain enamel, and their respective shares of total frit sales for that use were:

Year	*Ferro*	*Chicago-Vitreous*	*Pemco*	*Hommel*	*Ingraham-Richardson*
1973	42%	23%	21%	7%	7%
1974	43%	23%	22%	6%	6%
1975	42%	25%	22%	6%	5%
1976	41%	25%	25%	6%	4%
1977	40%	24%	24%	7%	5%

The sales of porcelain enamel frit about which Hommel complains were made to Briggs Manufacturing Company, a manufacturer of steel stampings for use at Briggs' bathtub manufacturing plant in Knoxville, Tennessee, to General Housewares Corporation for use at its Terre Haute, Indiana steel pot and pan plant, and to General Electric Co. for use at its Louisville, Kentucky large appliance plant. Two or more of the poreclain enamel frit manufacturers listed above competed for sales to these three plants. The sales of frit for pottery about which Hommel complains were made to Socio Pottery Company for use in its dinnerware plant in Socio, Ohio. Ferro and Hommel competed for sales to that plant. Total sales of frit for porcelain enamel by the five American manufacturers of that product, in pounds, were:

1973	180,188
1974	144,243
1975	101,484
1976	125,936
1977	134,397

During those years Ferro sold frit to each of the plants listed above at prices below its published price list and below the price charged to other customers for frit of like grade or quality. It was industry custom, followed by Hommel, to extend a freight allowance to equalize the freight cost to the customer's plant with that from the nearest competitor's plant. The difference in freight from Carnegie, Pennsylvania, to the Briggs plant in Knoxville, and from Ferro's Nashville plant in 1974 was $.69 per hundred pounds. The difference in freight from Carnegie to General Electric's Louisville plant and from Ferro's Nashville plant in 1976 was $.96. The difference in freight shipped to General Housewares' Terre Haute, Indiana plant and the Carnegie and Nashville plants was $.30 in 1973 through 1975; $.35 in 1976 and $.38 in 1977. Thus in the three instances in which sales were made to industrial customers at prices below those charged others for like grade or quality, the favored plant was one as to which Ferro's Nashville plant had some competitive advantage over Hommel by virtue of proximity.

In addition to the stipulated facts almost two hundred exhibits were received in evidence and the jury heard the testimony of fifteen witnesses, including an economist expert for each side. From the stipulated facts and these evidentiary sources the jury could find that Ferro is a large diversified company with assets over $250,000,000 and a net worth of $150,000,000, and an average annual profit of $23,000,000. From this deep pocket it was in a position to sustain sales of one product at less than total cost over a long period. Hommel has one plant, a net worth of $2,500,000, annual sales of $7,000,000, and in the five years involved operated at an annual loss of $7,000. Thus it was in no position to make

sales below total cost for any protracted period. Ferro selected three plants for the business of which its Nashville frit manufacturing plant was a logical supplier, to which it made sales over a number of years at prices not only below its published prices and below the price charged to others for products of like grade or quality, but also below its average total cost for the production of the product. Ferro maintains, and Hommel disputes, that the evidence is that all the prices in question were above average variable costs. The difference between them is over what should be included in the term average variable costs. From the evidence the jury could conclude that Ferro's calculation of average variable cost included direct manufacturing cost, but excluded the cost of salesman's bonus for procuring the sale, the cost of technical service to Briggs and General Electric, the expenses of the sales representative who serviced General Housewares, the cost of additional workmen's compensation insurance premiums and unemployment insurance contributions on additional payroll, and the cost of invoicing, bookkeeping, and collecting of the three accounts. Assuming the jury found that all these items were excluded from Ferro's calculation of average variable cost, it could conclude that Ferro's prices were below what would recapture all fixed costs and several variable costs, although above its average direct manufacturing costs. The jury could find from the evidence that the discounts were not occasional or sporadic incidents in response to competition, but were given to the favored customers over a period of four years. They could find that the discounts were kept secret and could reasonably infer that the purpose of the secrecy was so that owners of plants using frit as a raw material located elsewhere would not learn of them, and demand equal

treatment. Moreover they could reasonably infer that the three plants chosen for below cost pricing were plants for which, because of their respective locations Ferro's Nashville plant and Hommel's Carnegie plant were the most logical competitive suppliers. There was no "smoking gun" letter, saying that the purpose of the below cost pricing was for the express intention of excluding Hommel from competition at the three locations, but from the totality of the evidence the jury could infer that this was Ferro's purpose, and thus we must do so. Finally, from the evidence the jury could find that, but for Ferro's sales below cost, Hommel would in the years in question have retained or obtained a share of the market represented by each of the three plants.

Thus the fact pattern before the jury was that of an industry in which there were five established rivals, two of which had plants which by reason of location could economically supply frit users located at Knoxville, Louisville and Terre Haute. Sales industry-wide declined from 1973 through 1975, but turned upward in 1976. Although there was evidence from which a conclusion of declining demand and permanent excess capacity could be reached, the jury could reasonably conclude that the downturn was the temporary result of the general economy, and that the upturn in 1976 and 1977 suggested an industry situation of relatively stable demand. Either inference would, on the entire evidence, be rationally possible, and thus we must assume that the jury made the inference which, in light of the charge, supports the verdict.

The jury returned a special verdict, answering affirmatively the questions "[h]as the defendant violated . . . §2(a) of the Clayton Act," and "[h]as the defen-

dants' violation . . . been the proximate cause of any injury to the plaintiff's business." Ferro's motion for judgment notwithstanding the verdict requires that we consider whether those answers have any factual support. Since on a motion for judgment notwithstanding the verdict the court may consider whether a new trial should be granted, Fed. R. Civ. P. 50(b), (d), we must also consider the propriety of the court's charge.

II.

Before turning to the charge, it is worth noting that in rejecting Ferro's pre-trial motion for summary judgment the trial court disclosed his understanding of the elements of a Section 2(a) violation.

> In order to establish a prima facie Robinson-Patman violation, plaintiff must show 1) that one or more of the purchases involved is "in commerce," 2) that there has been a discrimination in price between purchasers of products of like grade and quality, and 3) that the effect of the price discrimination "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination. . . ." See *William Ingels & Sons v. ITT Continental Baking Co., Inc.*, 461 F. Supp. 410 (N.D. Cal. 1978). Where there is no direct evidence of an attempt to monopolize under Section 2 of the Sherman Act or a likelihood of injury to competition under Robinson-Patman, these showings may be inferred from a showing of predatory intent, and this intent, under both Acts, may be established by proof of predatory

pricing. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 87 S. Ct. 1326, 18 L.Ed.2d 406 (1967). . . .

The major issue in dispute in this case concerns the nature of the predatory pricing evidence which will be admissible at trial to permit the inference of predatory intent. Plaintiff contends that evidence of sales below total cost is permissible while defendant argues that sales below marginal cost, or at least variable cost,[1] is required before a jury may infer predatory intent.

O. Hommel Co. v. Ferro Corp., 472 F. Supp. 793, 795 (W.D. Pa. 1979). Rejecting Ferro's contention that evidence of sales below total cost should be excluded, and summary judgment entered, the court ruled:

In some circumstances, of course, sales below total cost may enhance competition even though a particular competitor may be injured. Such a result would be consistent with the goal of the antitrust laws. In other circumstances, however, sales below total cost could permit an inference of monopolistic or predatory intent. A determination of these issues cannot be made on a motion for summary judgment; it must await a full trial on the merits.

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1. Marginal cost is the cost of manufacturing "the last unit." Variable costs are costs that vary with changes in output, as distinguished from "fixed costs," which remain constant despite changes in output. The use of variable cost as a substitute for marginal cost is not an issue in this case.

472 F. Supp. at 796. Thus even at pretrial it was Ferro's contention that as a matter of law no sales price above variable cost could ever in any circumstances support a finding of a Section 2(a) violation. That position, which it also advanced on its motion for judgment notwithstanding the verdict, would if accepted entitle Ferro to a judgment in its favor even if there was other independent evidence from which predatory intent could be inferred.[1] It was clear throughout the case that price discriminations were made available to the Louisville,

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1. Actually the grounds advanced in support of the motion refined Ferro's position somewhat. They included:

(a) The proofs, taken in the light most favorable to the plaintiff, O. Hommel Company, establish as a matter of law, that defendant, in pricing its product above its average variable cost *to produce such product,* did not injure, lessen or adversely affect competition within the frit industry or otherwise violate any of the standards set down by the Robinson-Patman Amendment to the Clayton Act.

(b) Based upon the proofs adduced at trial, taken in the light most favorable to the plaintiff, the jury could not reasonably conclude that defendant sold either porcelain enamel or pottery frit in the relevant market between 1973 and 1977 at a price below its average variable cost *to produce.*

(I A, 163-164). (Emphasis supplied).
Thus it sought a ruling that in all circumstances sales at prices above average direct manufacturing costs, excluding other variable costs, were in a primary line Robinson-Patman case as a matter of law permissible. As noted in the text, there was evidence from which the jury could infer that some variable costs were excluded from Ferro's calculation of its average variable cost to produce.

Knoxville and Terre Haute customers and there was no real dispute over whether the sales prices to those plants were below total cost. The main disputed issue in the case was that identified in the ruling on the motion for summary judgment; whether from the totality of the circumstances the jury should be permitted to infer that the discriminations were made with predatory intent. Such an intention would, as the trial court noted, support the additional inference of likelihood of injury to competition.

Although in Point II of its brief on appeal Ferro urges that it is entitled to judgment as a matter of law because Hommel's percentage share of the total frit market did not decline in the years in question, that was not the ground advanced in its motion for judgment notwithstanding the verdict. Both pre-trial, when it moved for summary judgment, and post-trial, when it moved for judgment notwithstanding the verdict, Ferro contended that because the contested prices were above its average direct cost of production it was entitled to a verdict as a matter of law.[2] (III A, 802). Ferro's legal position was that the court need look no further. Additional evidence from which the jury might infer predatory intent could, on this theory, be disregarded.

The court in its charge rejected the contention that sales above average direct manufacturing costs must in all circumstances as a matter of law be immune from Robinson-Patman liability in a primary line competition case. Instead, it charged:

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2. Arguably the contention about Hommel's steady market share was advanced at least cryptically in the motion for a directed verdict (III A, 517). The contention was not made to or discussed by the trial court in

Appendix D.

> Now, I charge you that, where there is competition among members of a relatively stable industry, particularly where one of the members manufactures only the product in question, in this case, frit, porcelain or glaze, each manufacturer should charge prices which, over a period of, say, four years, as in this case, should equal the total cost; and, if a price less than the total cost has been effected or charged by the manufacturer, then, such pricing may amount to predatory pricing; that is, pricing intended to injure a competitor. Of course, to continue to charge less than total cost in this period of time could force one or more of the competitors in the frit industry into bankruptcy. You must make all your costs or you are going to go broke.

(III A, 912). This part of the charge described what, from the stipulated facts and the evidence, the jury could have found: that the industry was relatively stable, and that one manufacturer in it, Hommel, was in no financial condition to sell below total cost over a period of years. If the jury so found, the court charged, it could, but was not required to, infer that the price differentials were intended to injure Hommel as a competitor.

On the other hand, the court continued, there were circumstances in which the inference of predatory intent was in its view impermissible.

> However, were you to find that the market for frit was declining during the years 1973 to 1977, and that the frit industry was a declining industry, and there was a large amount of unused capacity, then, the prices charged by manufacturers need

the post-trial proceeding. (I A, 195-210).

> only equal the average variable costs; that is, the direct manufacturing costs.

(III A, 913). This part of the charge also described what, from conflicting evidence, the jury could have found: that the industry was in a permanent decline with a large unused capacity. In that case, the court made clear, the inference of predatory intent could not be made so long as sales were made, even over a long period, at less than total but more than average direct manufacturing costs. This part of the charge is actually more favorable to the defendant than any formulation of a marginal cost floor for predatory pricing proposed in the secondary literature on the Robinson-Patman Act, for even the Areeda and Turner formulation is generally considered to refer to short run rather than long run pricing below fixed but above marginal costs. *See* O.E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis,* 87 Yale L.J. 284, 322 n.88 (1977). That question need not be decided, however, for we must assume that the jury followed the instruction that if it found the industry to be a declining one, it could not infer predatory intent from sales above average direct manufacturing costs.

The charge limited the area of inquiry on predatory intent still further. Even if the jury found a reatively stable industry, or sales below average direct manufacturing costs, it must consider other factors:

> In determining whether such conduct was predatory — preying upon others, that is — or merely lawful competition, you may consider whether or not the Defendant enjoyed a dominant position in the frit market at the time, or whether there were

healthy, active competitors for the business. You may consider whether there was excess production capacity among the various competitors in the frit business, making price competition naturally more aggressive, since it is obvious that, in a declining business, it is better for a plant to produce some product and sell it at a price that covers at least its direct manufacturing expenses, than to allow its machinery and workmen to stand around idle.

You may consider whether or not there were barriers to potential new competitors entering the frit business in competition with Defendant and Plaintiff. You should consider these and all the other circumstances in the case in determining whether the price at which Ferro sold frit to some of its customers, as testified in this case, was predatory or not.

(III A, 913-14). Thus the court charged that the jury could, but certainly did not have to, infer a predatory intention only if (1) in a stable industry Ferro sold below total cost over a long period, or (2) in a declining industry it sold below average direct manufacturing costs. There was evidence from which the jury could legitimately draw either inference. The upturn in sales in 1976 and 1977 supports an inference of long-term reasonable stability. The evidence that variable additional labor costs for workmen's compensation premiums and unemployment insurance contributions was not taken into account casts doubt on Ferro's contention that it recaptured all variable manufacturing costs.

The court charged the jury to "consider whether or not geographic discriminations were employed by the Defendant for predatory ends." If the jury so found, he

continued, "[t]hat is evidence from which you may properly conclude that the discriminatory prices may have had the required effect upon competition." (III A, 919). This instruction was qualified still further by an instruction:

> The Act requires that [sic] a likelihood of adverse competitive impact attributable to unlawful price discrimination either in the form of one, a substantial lessening of competition, or, two, a tendency to create a monopoly.

(III A, 919). In considering the likelihood of adverse competitive impact even from intentionally predatory pricing, the jury was instructed:

> You should, of course, in this connection consider the instructions I have given you previously as to a declining industry. I must emphasize that the Act is concerned with the effect of price discrimination upon the state of competition and not with its effect upon an individual competitor as such. It has been said that the injury center is the vigor of competition in the marketplace rather than a hardship to the individual businessman. The Act is primarily concerned with the health of the competitive process, not with the individual competitor who must sink or swim in a competitive enterprise system. The crippling of a competitor by price discrimination is not an event of independent significance, but is relevant as a necessary incident of the injury to competition generally. For the purposes of the Act it is only against the background of the competitive structure that the fate of the individual competitor is significant. If the competitors are so numerous that the elimination of one will only have an in-

> finitesimal effect upon the overall business in the area, then competition has not been injured. On the other hand, where there are relatively few competitors in an industry, the injury to one may shatter the competitive structure and may lead to—may tend to lead to monopoly.

(III A, 921). Clearly there was evidence from which the jury could conclude the three plants chosen for discriminatory pricing, Briggs in Knoxville, General Electric in Louisville, and General Housewares in Terre Haute, were selected in order to exclude Hommel from those plants, that Hommel was in no position to compete for business by selling, long term, below cost, that Hommel had geographic disadvantages in competing for business in plants more distant from Carnegie, and that its loss in a five company industry would be likely to have an adverse effect on competition in that industry. There was evidence from which a different conclusion might be drawn, but we must make that which supports the verdict.

The only objection which Ferro makes to the charge is to that part of it which permitted the jury to find that sales below total costs, but above average direct manufacturing costs, continued over a period of time, supported an inference of predatory intention. Appellant's Brief p. 42-46. It describes this charge as unprecedented. That is hardly so, for in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 698 (1967), the Supreme Court, reversing a Tenth Circuit decision which set aside a jury verdict in a primary line competition case, noted that the offending price was less than defendant's "direct cost plus an allocation for overhead." The charge as given was more favorable than that which the *Utah Pie* court

appears to authorize, for it required the additional findings of reasonable market stability and continuation over time. The precedent on which Ferro relies is a secondary one, P. Areeda and D. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 Hav. L. Rev. 697 (1975). This article first suggested the analysis which since the beginning of the case Ferro has insisted is required as a matter of law. As the trial judge observed.

> Areeda and Turner's analysis, however, has not survived unscathed. See O. Williamson, "Predatory Pricing: A Strategic and Welfare Analysis," 87 Yale L. Rev. 284 (1977); Scherer, "Predatory Pricing and the Sherman Act: A Comment," 89 Harv. L. Rev. 869 (1976); Scherer, "Some Last Words on Predatory Pricing," 89 Harv. L. Rev. 901 (1976).

472 F. Supp. at 796. But we need not join in the debate between Areeda and Turner and their several critics about the relative merits of marginal cost pricing in general. The charge which Ferro objects to requires a finding of a relatively stable market and below total cost sales over at least four years in an industry whose customers are large, single situs industrial plants, and selective price cuts by the company with the deepest pocket to plants for which the weakest competitor in the industry is a logical competitor. The charge permitted, but did not require, the inference of predatory intent. A factor bearing on that intent was the secrecy of the discriminatory pricing arrangements, which could be found by the jury to have been designed to protect the level of prices to plants more distant from Hommel, and thus more shielded from competition by freight differentials. If that set of circumstances would not support an

inference of predatory intention under the Areeda and Turner analysis (which I do not suggest), the analysis is flawed, for those circumstances strongly suggest an intentional move on a financially weak but otherwise effective competitor for the frit trade of those large buyers located where they can be serviced by Ferro's Nashville plant. The Areeda and Turner thesis is that marginal cost pricing is presumptively rational conduct in the short run because it is either profit maximizing or loss minimizing. Thus, the argument goes, the inference of predatory intent is irrational. But in the long run a policy of sales below total cost is not profit maximizing. If Ferro's Nashville plant were to continue sales below total costs over the long term it would cease to be a profit center in Ferro's diversified business. If it could compete with the competitor which was located near enough to users of frit which the Nashville plant could supply only by selling below cost, a rational profit maximizing policy would be to close the plant, not to subsidize it permanently. Thus in the sum of circumstances which the jury could find here—a relatively stable market, two plants located as the Nashville and Carnegie plants are, one of them owned by a diversified deep pocket company and the other a small family business—the inference of predatory intention from long term sales below total cost is not compelled but, as the court charged, certainly legitimate. The jury could well have reasoned that Ferro intended to deprive Homm l of the Briggs, Knoxville; General Electric, Louisv e; and General Housewares, Terre Haute businesses below cost pricing, knowing that freight differentials sulated its other frit plants from competition from Ca egie, in the expectation that Hommel would fail and t at there were sufficient barriers to entry that it would not soon

be replaced. See Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy,* 89 Yale L. J. 213, 227-231 (1979) (discussing the multiple factors which may be barriers to entry). If the recent case of *Northeastern Telephone Co. v. AT&T,* No. 80-7740 (2d Cir., May 27, 1981), may be read as committing the Second Circuit to the rule that pricing above marginal cost is always in all circumstances legal, I would not follow it, because such a rule would exclude from the factfinder the authority to draw a legitimate inference of predatory intention from the totality of circumstances. The Supreme Court affirmed the legitimacy of such an inference in *Utah Pie Co. v. Continental Baking Co.,* 386 U.S. 685 (1967). Thus I would reject Ferro's claim that the charge was in error in the one respect complained of.

III.

Ferro claims on appeal that even if the charge on predatory pricing was correct and the evidence supports the inference of predatory intention, it is entitled to a judgment notwithstanding the verdict nevertheless, because there was no proof of any adverse effect on competition. That contention was not listed among the grounds advanced in Ferro's motion for judgment notwithstanding the verdict. In the motion for a directed verdict the point was advanced, albeit cryptically.[3] Since

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3. Ferro's attorney argued:

On the Robinson-Patman Act, we have two bases for our motion. One, that in a like competition case, there is the same requisite for showing damage to competition. All, again, that has been shown is that Hommel might have gotten sales. That is the best that was testified to. Nobody—their market share was the same; nobody was excluded from the mar-

the point was raised below it can be considered here, at least as a ground for a new trial, and perhaps as a ground for ordering the entry of judgment notwithstanding the verdict.[4] Ferro's position is that because the market shares of the five firms which manufactured frit did not significantly change over the years in question, as a matter of law the jury could not find that "the effect of such discrimination may be substantially to lessen competition . . . in any line of commerce, or to injure, destroy, or prevent competition with [Ferro]". 15 U.S.C. §13(a). Ferro's argument, however, misconceives the prophylactic purposes of the Robinson-Patman Act. Faced with discriminatory pricing a primary line competitor is not required to wait until the cause of action for injury to its business or property vests in a trustee in bankruptcy. Indeed it can sue for injunctive relief even before any harm to its business or property has occurred, although in such a case the recovery of damages under Section 4 of the Clayton Act would be impermissible. The distinction between the requirements for proving a Section 2(a) violation and those for proving damages recoverable under Section 4 is an important one which was reemphasized by the Supreme Court in *Truett-Payne Co. v. Chrysler Motors Corp.*, 49 U.S.L.W. 4516 (May 16, 1981). There the Court's majority rejected the contention, relied on by Justice Powell dis-

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ket. Easy entry into the market is all established at this juncture by the evidence.

(III A, 517).

4. But *cf.* Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947); Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948); Johnson v. New York, New Haven & Hartford Railroad, 344 U.S. 48 (1952); Garmon v. Metropolitan Life Ins. Co., 175 F.2d 24, 28 (3d Cir. 1949).

senting, that because plaintiff's market share did not shrink over a four year period, he could not establish a Section 2(a) violation. The test for a Section 2(a) violation is whether, based on the evidence, competition, overall or with the discriminator, *may* be injured. Actual harm is relevant only to the damage claim. The distinction made in *Truett-Payne* is not new to Robinson-Patman jurisprudence. *See Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 at 702 (1967).

In evaluating the likelihood of harm to competition with Ferro, the jury could consider the relative financial strength of Ferro and Hommel, the location of the three plants which were selected for below total cost pricing, the duration of the price cuts, and the stipulated fact that Hommel maintained its 6-7% market share over the four years in issue while incurring operating losses in each year. The jury may well have concluded that those operating losses would not have occurred if Ferro had been able to retain some of the Briggs and General Electric and obtain some of the General Housewares business. It could have found that Hommel could not increase its share of business at the limited number of industrial plants which used frit as a raw material because by the custom of the trade, freight was equalized to the nearest producer's plant, and absorption of freight to distant customers would increase its operating losses. It could have found that the price cuts exposed Hommel to the risk of bankruptcy, in an industry with only five suppliers. Short of this it could have found that by freezing out Hommel from three logical customers, Ferro forced Hommel to compete with it for customers as to which one of its other plants had a freight differential advantage, which would place a floor under its competitors'

prices. In short, there was ample evidence of the possibility of harm to competition in the frit industry in general and of competition with Ferro in particular. The possibility of such harm coupled with pricing which could legitimately be inferred to be predatory, suffice to establish a violation of Section 2(a).

IV.

Ferro's final point is that Hommel's proof of damages does not satisfy the standard of certainty required by Section 4 of the Clayton Act. It concedes that the court's charge on proving lost net profits was correct.[5] But Ferro urges that Hommel's evidence establishes that it would have incurred additional overhead expenses in order to produce the extra frit it might have sold but for the illegal pricing, and that the jury damage award fails to taks such expense into account. However the jury heard the testimony of Richard O. Hommel:

> Q. Would you—if you had produced an additional 2,000,000 pounds, 3,000,000 pounds a year, which you say you could have done, would you have had any additional costs, other than the materials and the items you have read to us?
>
> A. Nothing of any major consequences.

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5. The court charged:

> [I] instruct you that only lost net profits, before taxes, may constitute an item of actual damages in antitrust cases. Net profit before tax is the total revenue received from sales minus the cost of the goods sold, including labor and material costs, and minus operating expenses and overhead.

(III A, 939).

(II A, 40). If it credited this testimony, the jury was entitled to calculate damages on lost sales without taking into account any additional overhead expense. Thus Ferro's sole challenge to the amount of the verdict is misdirected. There is ample evidence from which the jury could find lost net profits.

V.

I would affirm the order of the district court denying Ferro's motion for judgment notwithstanding the verdict.

APPENDIX E

Order of the Court of Appeals for the Third Circuit at Nos. 80-2062, 80-2723 Denying Petition for Rehearing

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

The petition for rehearing filed by APPELLEE, O. HOMMEL COMPANY, in the above entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Gibbons, Higginbotham and Sloviter would have granted the petition.

BY THE COURT

(Signature illegible)

Circuit Judge

DATED: September 23, 1981

Appendix F.

STATUTE

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a):

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods of quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof

unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Supplemental Brief

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FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-1116

IN THE

Supreme Court of the United States

October Term, 1981

THE O. HOMMEL COMPANY,
Petitioner,
v.
FERRO CORPORATION,
Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

At Nos. 80-2962, 80-2723

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SUPPLEMENTAL BRIEF FOR PETITIONER

This supplemental brief is filed to call attention to a new case in the Court of Appeals for the Ninth Circuit which creates a conflict with the decision of the court below.

In the present case, the Court of Appeals held (p. 48a):

> "A seller faced with a choice of making *a sale at above marginal cost but below total cost*, or foregoing the sale, will choose to make the sale. Such a profit maximizing sale *cannot be indicative of predatory intent.*" (emphasis added)

In our petition we argued that this absolute rule of law was error and that the question as to predatory intent was for the jury. (pp. 12-14).

On August 7, 1981 the Ninth Circuit had held in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.* exactly to the contrary of the Third Circuit, but, before Hommel filed its petition, the opinion was withdrawn: 652 F.2d 917. On February 10, 1982, the Ninth Circuit reinstated its August opinion and denied a petition for rehearing and for *en banc* consideration. The February order was approved by a majority of the 23 active judges with only one dissent. The order and the dissenting opinion are printed in the appendix to this brief.

In the reinstated opinion the Ninth Circuit held (1981-2 CCH Trade Cases p. 73, 897 at 73,909):

> "If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory."

This burden Hommel accepted, and the jury found that Hommel had met the burden. The Third Circuit, contrary to the Ninth Circuit, prevents Hommel from making the showing.

The existence of the conflict is emphasized by the dissenting opinion in the Ninth Circuit case which says that the majority holds that the determination is to be made by the jury and that "it is difficult to see how . . . a district court could even keep a predatory pricing case away from the jury" (p. 10a). The Ninth Circuit dissent, therefore, agrees with the Third Circuit, but the Ninth Circuit majority is in conflict.

Respectfully submitted,

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APPENDIX

WILLIAM INGLIS & SONS BAKING CO., et al., Plaintiffs-Appellees, v. ITT CONTINENTAL BAKING COMPANY, INC., et al., Defendants-Appellants; WILLIAM INGLIS & SONS BAKING CO., et al., Plaintiffs-Appellants, v. ITT CONTINENTAL BAKING COMPANY, INC., Defendant-Appellee.

Nos. 79-4207, 78-3604

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Slip Opinion

February 10, 1982

OPINION:

Before: BROWNING, PECK*, and SNEED, *Circuit Judges*

*Honorable John W. Peck, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

ORDER

The panel in the above-entitled case will amend its August 7, 1981 opinion by changing the sentence of text immediately following footnote call 31, slip op at 3926, to read as follows:

When this is the case, the firm's average various cost—the sum of those costs that vary with output divided by the total units of output—generally will be less than the firm's marginal cost—the variable cost associated with producing the last unit of output.

The panel will further amend its opinion as follows: Delete the second paragraph of footnote 20. Slip op. at 3923, 652 F.2d at 936 (advance sheet only) ("The relevance . . . competition.") Delete the paragraph of text

containing footnote calls 33 and 34 and the two corresponding footnotes. Slip op. at 3927, 652 F.2d at 939-40 (advance sheet only) ("Much . . . allocative efficiency.")

TO BE PUBLISHED

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing. One judge of the court requested the matter be considered en banc. A vote of all active judges was taken and a majority voted against en banc consideration.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DISSENT BY WALLACE

DISSENT

Wallace, Circuit Judge, Dissenting from Denial to Rehear en banc:

I dissent from the court's refusal to rehear this case en banc. To prevent intracircuit conflict, panels of this court must follow precedent or urge the court's active judges to overrule the precedent en banc. See, e.g., United States v. Smith, 645 F.2d 747, 748 (9th Cir. 1981) Reinhardt, J., concurring specially), reheard en banc, No. 80-1380 (argued Dec. 18, 1981), Yet by failing to take this case en banc, we have sanctioned a decision which departs from the settled law of this Circuit. Through a strained and unpersuasive reading of prior cases, the majority seeks to harmonize the "novel" and "innovative" rule it invents, *ante* at ____ (Peck, J., dissenting), with the rule it, in effect, rejects. In addition, the major-

ity's holding is an unjustified departure from the economically-sound marginal cost rule. By permitting this result, the court not only approves the use of an amorphous, unpredictable test for predatory pricing, but also leaves district courts in the Circuit with no guidance as to which rule—the "marginal cost rule" or the *Inglis* reformulation—should apply to pretrial dismissal motions in antitrust cases. Therefore, I respectfully dissent.

I

Section 2 of the Sherman Act, 15 U.S.C. §2, proscribes monopolization and attempts to monopolize. The three elements of an attempted monopolization claim—specific intent to control prices or destroy competition; predatory or anticompetive conduct directed to accomplishing the unlawful purpose; and a dangerous probability of success—interact. Thus, specific intent and a dangerous probability of success may, in appropriate cases, be inferred from predatory or anticompetitive conduct.

If this were all the majority sought to articulate in *Inglis*, there would be no departure from our prior decisions. However, *Inglis* attempts a dramatic expansion of the types of anticompetitive or predatory conduct which will support an inference of the other two elements of a section 2 attempted monopolization claim. First, as Judge Peck recognized in this dissent, the majority's opinion "departs sharply from this Circuit's former rule that specific intent to monopolize, and hence probability of success, cannot be inferred from conduct alone unless the conduct is exclusionary or otherwise restrains trade." *Ante* at ____. Second, the majority's opinion seeks to relegate the marginal cost rule, which represents a workable, predictable and efficient means of determining what sorts of pricing constitute predatory conduct under

the Sherman Act, to the slag heap of discarded antitrust formulae, and to substitute in its place a subjective and amorphous test involving a shifting burden of proof which leaves to the jury, in nearly every case, decisional authority on attempted monopolization claims.

I do not disagree with the majority's basic, abstract definition of predatory pricing: "Pricing is predatory only where the firm foregoes short-term profits in order to develop a market position such that the firm can later raise prices and recoup lost profits." *Ante* at ____, *quoting Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 856 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978) (*Janich*). I do believe, however, that in the majority's attempt to "eschew dogmatic adherence to a particular, rigid test and to fashion broad and flexible objective standards concerned with accurately evaluating the purposes of business behavior," *ante* at ____ n.18, it has advocated an unworkable test for distinguishing price reductions that constitute legitimate, competitive responses to market conditions from price reductions that are predatory attempts to monopolize the relevant market. The result may well deprive the American public of the benefits flowing from competition on the merits.

Under the majority's test:

> [T]o establish predatory pricing a plaintiff must prove that the anticipated benefits of defendant's price depend on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. *If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory.* If, however, the plaintiff proves that the defendant's prices were below average variable

> cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors. *Ante* ____ (emphasis added).

This "standard" is not a formula or test for predatory pricing in any meaningful sense of those terms; rather, it merely restates the basic, abstract principle on which there is no disagreement, and injects into it the new variable of burden of proof, subject, of course, to the final decision of the jury. Not only is this standard wrong from an antitrust policy perspective, but it is inconsistent with the workable approach developed by this Circuit over the past five years to define predatory pricing—the "marginal cost rule."

II

In my view, the fairly settled law of this Circuit prior to *Inglis* was that we had adopted the test advocated by Professors Areeda and Turner in their article *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975), qualified by refinements or exceptions that might be developed through case-by-case analysis. Since an efficient manufacturer will set prices where price equals or exceeds marginal cost, prices should be considered predatory only if they are less than the defendant's marginal cost. Prices set at marginal cost can injure only less efficient manufacturers. Thus, "pricing at marginal cost is the competitive and socially optimal result," *id.* at 711, quoted with approval in *Janich*, *supra*, 570 F.2d at 857 & n. 9. Instead of making a new exception to the marginal cost rule, the majority's opinion attempts to eliminate

the rule because it concludes that it was not compelled to follow it, even though our previous cases have announced and confirmed it.

It takes only a brief review of these prior cases to demonstrate that this Circuit has adopted the marginal cost test as the standard for measuring what constitutes predatory pricing. In *Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977) *(Hanson)*, we affirmed a directed verdict entered in favor of the defendant where, as here, the plaintiff had introduced no evidence that the defendant's prices were less than its marginal cost. In so doing we clearly stated the rule that predation

> could be shown by evidence that Shell was selling its gasoline at below marginal cost or, because marginal cost is often impossible to ascertain, below average variable costs . . . *Hanson's failure to show that Shell's prices were below its marginal or average variable cost was a failure as a matter of law to present a prima facie case under §2.*

Id. at 1358-59 (emphasis added, footnotes omitted). In a footnote we restated this holding. "[P]roof of pricing below marginal or average variable cost is [a] prerequisite to a prima facie showing of an attempt to monopolize . . . " *Id.* at 1359 n. 6. We also articulated the reasoning supporting the marginal cost rule.

> If its prices were above its costs, and nevertheless Shell's [sic] did drive Hanson out of business, this can only because Hanson was was so inefficient that at prices at which Shell could make a reasonable profit he could not. The antitrust laws were not intended, and may not be used, to require businesses to price their products at unreasonably high prices (which penalize the consumer) so that less efficient

competitors can stay in business. The Sherman Act is not a subsidy for inefficiency. *Id.* at 1358-59.

In *Hanson*, therefore, we established the general test for predatory pricing —the marginal cost rule. We reaffirmed this test in *Janich* where we stated that "an across-the-board price set at or above marginal cost should not ordinarily form the basis of an antitrust violation." 570 F.2d at 857 (footnote omitted). There, as in *Hanson*, we affirmed a directed verdict entered for the defendant where he plaintiff had been unable to show that the defendant set any of its prices below its marginal cost. "Janich did not produce evidence that American's prices were below its average variable costs." *Id.* at 858.[1] in *California Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727 (9th Cir. 1979) *(California Computer)*, we followed *Janich* and *Hanson* by holding that failure to show that the defendant's prices were less than its marginal or average variable costs was a failure as a matter of law to raise a prima facie case of predatory pricing. *Id.* at 743. And just recently, in *Murphy Tugboat Co. v Crowley*, 658 F.2d 1256 (9th Cir. 1981) *(Murphy Tugboat)*, we affirmed a judgment n.o.v. granted for the defendant because the plaintiff had not alleged or shown that the defendant's "marginal costs . . . ever exceeded [its] price." *Id.* at 1259 (footnote omitted).

Thus, my reading of the case law prior to *Inglis* is that proof that a defendant's prices were less than its marginal cost (or its average variable cost) was an essential element of a predatory pricing claim, whether

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1. Since marginal cost is often impossible to determine, *Janich* followed *Hanson* and Areeda & Turner in holding that average variable cost may be used as an evidentiary substitute for marginal cost. 570 F. 2d at 858.

brought under section 2 of the Sherman Act, *see Hanson, Janich*, and *California Computer*, or section 1 of the Sherman Act, *see Murphy Tugboat*. This rule was subject to several possible exceptions, which have not been precisely refined by this court because they have not been squarely presented for review. Cf *California Computer, supra*, 613 F.2d at 743 ("refinement of the marginal or average variable cost test will be necessary as future cases arise"). On the one hand, prices above marginal or average variable cost may, in some instances, be considered predatory if (1) the price is below the defendant's short-run profit maximizing price and high barriers to entry restrict competition in the relevant market, *see Hanson, supra*, 541 F.2d at 1358 n.5; or (2) if the price is a "limit price" set by a monopolist, *see California Computer, supra*, 613 F.2d at 743. On the other hand, prices below marginal or average variable cost may, in appropriate circumstances, be considered non-predatory if (1) they are temporary, promotional prices set by a firm without appreciable market power in order to effect the entry of a new product into an existing market, *see* Areeda & Turner, *supra*, at 713-15; cf *Hanson, supra*, 541 F.2d at 1359 n. 6 (below marginal cost pricing is prima facie, but not conclusive, evidence of predatory pricing); (2) they were set in a good-faith effort to meet the lower price posted by a competitor, *see California Computer, supra*, 613 F.2d at 743; *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 433 (N.D. Cal. 1978), *aff'd sub nom., Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980) (per curiam); or (3) as Continental argued in *Inglis*, if the defendant is confronted with an "excess capacity" situation, *see ante* at ____; Areeda & Turner, *supra*, at 710 & n.32.

Absent these exceptional situations, however, a predatory pricing claim requires proof of prices set below

marginal or average variable cost.[2] This is what *Janich* holds when it states that prices set at marginal cost "should not ordinarily form the basis for an antitrust violation." 570 F.2d at 857. If the majority in *Inglis* had followed Ninth Circuit precedent, it would have reaffirmed the marginal cost rule and, accordingly, affirmed the district court's grant of the motion for judgment N.O.V. This would not be, as the majority insists, "rigid adherence to a particular cost-based rule." *Ante* at ____. Rather, it would merely confirm that the law of this Circuit is the marginal cost rule, a rule which includes within its scope the potential for evolution and change as future cases dictate.

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2. The majority's attempt to distinguish our previous cases is therefore not valid. The tempering language the majority isolates from *Hanson*, *ante* at ____, represents two potential exceptions to the marginal cost rule. Contrary to the majority's assertion, both *Janich* and *Hanson* adopted and applied the marginal cost test: both cases affirmed directed verdicts entered for the defendant because the plaintiff had been unable to demonstrate that prices were ever set below marginal or average variable cost. The language the majority quotes from *California Computer*, *ante* at ____, does not alter the fact that the panel in that case followed *Hanson* by holding that failure to show that the defendant's prices were less than its marginal or average variable cost was a failure as a matter of law to raise a prima facie case of predatory pricing. 613 F.2d at 743. Furthermore, it is eminently clear from the context of the language the majority quotes that "other aspects" of a monopolist's conduct may be considered predatory even if its pricing practices are not. After all, predatory pricing is not the only sort of anticompetitive conduct which will support a section 2 claim of monopolization or attempted monopolization. Nor, finally, is *Murphy Tugboat* distinguishable from *Inglis* on its facts. In both cases, the plaintiffs failed to

III

One resultant benefit of the marginal cost rule is that it allows the courts to exercise some degree of control over the burgeoning antitrust litigation. Since the majority holds that average variable cost is a determination to be made by the jury, *ante* at ____, it is difficult to see how, under this standard, a district court could ever keep a predatory pricing case away from the jury. As Judge Peck wrote in this dissent.

> The majority allows automatic inferences, but cannot ensure that they will be drawn in the right direction. The way lies open for juries to infer pricing below average variable costs from the jurors' preliminary view of the predatory nature of the defendant's conduct, instead of vice-versa.

Ante at ____.

The marginal cost rule prevents this sort of abdication of judicial responsibility in predatory pricing cases. In *California Computer*, for example, we affirmed a directed verdict entered for the defendant where the plaintiff had been unable to prove that the defendant's prices were less than its marginal or average variable cost, or that the defendant's conduct was anything other than a legitimate attempt to meet lower prices offered by the competition. We wrote that "[w]ere § 2 interpreted not to exempt price cuts from attack under these circumstances, there could be no adequate guidelines for a jury

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show that the defendants' marginal costs ever exceeded their prices. In *Inglis*, however, the plaintiff will be able to get its case to the jury, something the plaintiff in *Murphy Tugboat* was unable to do because of the marginal cost rule.

to decide the issue of whether the prices at issue were 'reasonable.' " 613 F.2d at 743. Focusing as it does on a subjective characterization of the "tendency" of a defendant's price, the *Inglis* reformulation fails to provide any guidelines, let alone adequate guidelines, for the jury. It was therefore no surprise that both parties in this case urged rehearing *en banc* because, quite aside from its substantive defects, the majority's "standard" invites needless confusion of juries and offers little predictability to the business community.

The majority seems to minimize the advantages of predictability offered by the marginal cost rule. If there are legitimate competitive reasons for pricing below marginal cost then this court should recognize those reasons by creating an exception to the marginal cost test. But is it more predictable to ask the jury, as the *Inglis* standard does, to measure the "anticipated benefits" of a defendant's pricing policies, than to ask the district judge, on a motion for summary judgment or a directed verdict, to decide (1) whether the marginal cost rule applies, and (2) whether the defendant's price was below its marginal cost? To me the answer is clearly no.

In addition, one should not overlook the added burden *Inglis* will place on the district courts. Disposing of unmeritorious and strike cases by the established marginal cost rule will, if the *Inglis* reformulation is followed, be at an end. From this perspective *Inglis* is not only a change in the law of this Circuit, but one with untoward consequences for the district courts.

IV

One may well wonder where this case leaves the district judge. *Inglis* did not, because it could not, overrule *Hanson*, *Janich*, *California Computer* and *Murphy Tugboat*. It merely distinguished them. Thus, I assume, a district judge will be free to follow them. If so, a district court may, consistently with *Inglis*, enter a directed verdict for the defendant where the plaintiff fails to establish that the defendant ever set prices below marginal or average variable cost. This would clearly be consistent with the marginal cost rule. Moreover, it would, in the majority's own words, "not [be] inconsistent with the result [ ] reached in [*Inglis*]" because the plaintiff would not be "able to prove that the defendant had sacrificed greater profits or incurred greater losses than necessary, in order to eliminate the plaintiff." *Ante* at ____ (footnote omitted).

As the law of this Circuit now stands, four of our decisions apply the marginal cost rule and one does not. I would think it would be difficult for this court to reverse a district judge because he or she chose to follow precedent adopted and applied by us in four cases over the past five years, rather than a newer standard advocated in an opinion which professes consistency with those four older decisions.

Needless to say, I do not believe the district judge should be presented with such an obvious conflict. It would be far more appropriate for us to eliminate this dilemma by clarifying *Inglis* with an *en banc* rehearing. Therefore, I respectfully dissent from the court's failure to do so.

Opposition

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No. 81-1116

In the Supreme Court of the United States

October Term, 1981

THE O. HOMMEL COMPANY,
Petitioner,

vs.

FERRO CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NOS. 80-2062, 80-2723

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the District Court have directed a verdict or granted judgment notwithstanding the verdict for defendant Ferro because there was not sufficient evidence of the requisite adverse effect on the state of competition from price discrimination in primary line competition (manufacturer-sellers) to establish Clayton/Robinson-Patman Act liability?

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES INVOLVED AND JURISDICTION

Hommel has set forth the pertinent provisions of Section 2(a) of the Clayton Act (1914) as amended by the Robinson-Patman Act (1936) (15 U.S.C. §13). Pet. 2. The Clayton Act, as amended in 1936, is frequently referred to as only the Robinson-Patman Act.

Ferro concurs in Hommel's Statement of Jurisdiction.

COUNTERSTATEMENT OF THE CASE

Price discrimination is not illegal *per se*. The Clayton/Robinson Patman Act proscribes price discrimination in primary-line competition (manufacturing-sellers) only "[w]here the effect of such discrimination may be *substantially to lessen competition or tend to create a monopoly* . . ." 15 U.S.C. §13(a); emphasis supplied. This was *not* a secondary-line competition case (competing retail buyers from a manufacturer or wholesaler).[1] As Clayton/Robinson-Patman Act cases establish, the distinction is crucial (See II.A. below).

The Majority Opinion (Judges Garth and Hunter) of the Third Circuit (rehearing denied, 6 to 3, by all Active Judges of the Third Circuit) concluded that there was not sufficient evidence of injury to competition in the frit for porcelain enamel industry for the case to have been submitted to the jury on Clayton/Robinson-Patman liability and directed judgment be entered for Ferro.[2]

The Third Circuit applied long-established Clayton/Robinson-Patman judicial precedent in primary-line competition cases to the particular facts of this case. The sole substantive issue that Petitioner is asking this Court to review is whether the Third Circuit's assessment of the evidence was correct.

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1. Hommel, Ferro and three other companies manufacture an ingredient of porcelain enamel ("frit"-fractured glass). The manufacturers of large home appliances (refrigerators, stoves), bathtubs and steel pots and pans purchase frit to produce the porcelain enamel finish on these products. Majority Opinion (hereafter Op.), Petition (hereafter Pet.) 25a-26a.

2. This conclusion was based on a printed Appendix of the trial evidence of almost 1,000 pages; a 40-page Stipulation of Facts and Exhibits; and almost 150 exhibits (most multi-page).

ARGUMENT

I. THE THIRD CIRCUIT DECISION WAS BASED ON THE PARTICULAR FACTS OF THIS CASE ESTABLISHING THAT THERE WAS NO ADVERSE EFFECT ON COMPETITION AND THE CASE THUS HAS NO PRECEDENT VALUE

Price discrimination unlawful under the Clayton/Robinson-Patman Act may be found only when two statutory requirements are established: (1) a price difference between purchasers of commodities of like grade and quality, (2) which has the effect of substantially lessening competition. As the Third Circuit properly held, there could have been no finding of unlawful price discrimination under the facts of this case because there was no demonstration of the necessary adverse effect on competition. Indeed, the direct evidence presented at trial affirmatively established that there was no adverse effect on competition.

As the Third Circuit observed, there are "two basic means of meeting the competitive injury requirement: (1) actual competitive injury shown by market analysis; and (2) predatory intent from which competitive injury may be inferred." Op. Pet. 38a. Neither means was available to petitioner under the facts of this case, since the affirmative evidence established that there was no adverse effect on competition from the challenged activities, and no violation of the Clayton/Robinson-Patman Act thus could have been found.

In considering whether actual injury had been shown, the Third Circuit stated: "There was clearly no actual competitive damage in this case." Op. Pet. 38a. The Court relied on numerous items of evidence, including: (1)

the market share of Ferro dropped; (2) Hommel retained its market share; (3) the market shares of other industry competitors (i.e., Chicago-Vitreous and Pemco) increased; (4) the sales at issue were to only *three* of Ferro's national customers; were only 5% of its sales; and were *less than 2% of the total market sales;* (5) there was no evidence of any trend toward monopolization; (6) there was no evidence of a less competitive industrial structure; and (7) there was no collapsing price structure. Given these significant facts with respect to competition in the marketplace, the Third Circuit concluded:

> "Even the most generous reading of the full record fails to disclose any competitive harm which Hommel suffered (its market share remaining stable, and its income and gross profits on the sale of porcelain enamel frit having increased between 1973 and 1977), much less 'detrimental effects on competition.'" Op. Pet. 38a-39a.

Similarly, in considering whether any inference of competitive injury properly could have been made under the facts of this case, the Third Circuit concluded "that there is no express evidence of predatory intent and that the use of any double inference test [inferring competitive injury from pricing practices], on the facts of this case, was improper." Op. Pet. 41a.

In reaching this conclusion, the Court noted that Hommel stressed the secrecy of the prices of the sales made by Ferro to three customers as constituting direct evidence of predatory intent (even though all companies in the frit industry, including Hommel, sold much of their output at unpublished prices).

As the Third Circuit correctly observed, however, such secrecy "cannot be viewed as evidence of predation", since

it "does not indicate" in any way "that Ferro intended to drive Hommel out of business with the hope of obtaining monopoly profits" and, further, is consistent with pro-competitive price rivalry in an oligopolistic industry. Op. Pet. 41a-42a.

In view of this absence of any evidence establishing any injury to competition from the challenged pricing activity, the absence of any direct evidence of any predatory intent by Ferro to injure competition, and an affirmative showing to the contrary, the adverse effect on competition necessary to support a finding of Clayton/Robinson-Patman Act liability simply could not be inferred contrary to these facts through use of the "double inference" test. *See,* e.g., *International Air Industries, Inc. v. American Excelsior Co.,* 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976).

Hommel failed to present sufficient evidence of injury to competition from the challenged pricing activities. Petitioner therefore failed to establish one of the necessary elements of a showing of Clayton/Robinson-Patman Act liability and the Third Circuit properly directed judgment be entered for Ferro.

The factual issue of the sufficiency of the evidence in the case to establish the required injury to competition is an inappropriate issue for consideration by this Court on *certiorari.* Any other decision given the particular factual circumstances of this case would be anticompetitive, raise a potentially mischievous precedent in conflict with Sherman Act policies, and could only have the effect of chilling the existing price competition in this industry.[3]

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3. The Third Circuit noted: "A court must be wary in imposing liability that would result in 'price uniformity and rigidity.'" Op. Pet. 37a following cited decisions of this Court.

II. THE HOMMEL ARGUMENTS FOR CERTIORARI ARE WITHOUT MERIT

A. It Is Injury to the State of Competition (Not a Single Competitor's Loss of Particular Sales) That Must Be Established in a Primary-Line, Clayton/Robinson-Patman Claim

Hommel decries the Third Circuit emphasis on the 1914 Clayton Act which renders price discrimination illegal only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . ." In 1936, as part of the Robinson-Patman Amendments, there was added to this provision "or to injure or destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . ."

Hommel argues that under this 1936 amendment, its alleged loss of sales to the three Ferro customers because of Ferro's lower prices,[4] permitted the case to go to the jury.

The judicial precedent for over 20 years has recognized that the 1914 Clayton Act test of injury to the *state of competition* applies in primary-line competition. The 1936 Robinson-Patman test of injury to *a competitor* is only pertinent in secondary-line competition. Op. Pet. 39a, Note 8.

The distinction was made in *F.T.C. v. Anheuser-Busch*, 363 U.S. 536 (1960). Anheuser-Busch sold beer in the St. Louis area, competing with other national beer sellers, at lower prices than it sold beer in other parts of the country.

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4. The Third Circuit, on the full record, characterized this Hommel claim as only a "speculative possibility". Op. Pet. 38a.

This Court held (reversing the Seventh Circuit) that a price difference alone was enough to show the first prong of Clayton/Robinson-Patman liability: a price discrimination. "The statute itself spells out the conditions which make a price difference illegal or legal . . ." 363 U.S. at 550.

This Court reviewed the statutory history. The 1914 Clayton Act had been principally aimed at primary-line "sellers". 363 U.S. at 543. But, "[t]he 1936 Robinson-Patman Amendments to the Clayton Act were motivated principally by Congressional concern over the impact upon *secondary-line competition* . . ." 363 U.S. at 543-544; emphasis supplied. This was "[t]oo well known to require extensive exposition . . ." 363 U.S. at 543. Citations in support, 363 U.S. at 544, Note 7.[5]

The Seventh Circuit, on remand, taking its cue from this distinction, determined:

> "The [Clayton/Robinson-Patman] Act [in primary-line competition] is really referring to the effect upon competition and not merely upon competitors. *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 10 Cir., 1959, 269 F.2d 950, 954, *certiorari denied* 363 U.S. 843, 80 S.Ct. 1608, 4 L.Ed. 2d 1727. In this respect §2(a) must be read in conformity with the public policy of preserving competition, but it is not concerned with mere shifts of business between competitors. It is concerned with substantial impairment of the vigor or health of the contest for business, regardless of which

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5. This Court also distinguished an earlier case that had held competitive injury could be inferred from substantial price discrimination. *FTC v. Morton Salt*, 334 U.S. 37 (1948). *Morton Salt* involved secondary-line "purchasers". *Anheuser-Busch*, however, involved "[d]ifferences in prices among competing *sellers* [primary-line]". 363 U.S. at 552, Note 21; emphasis supplied.

competitor wins or loses. The competition which is sought to be protected by this section is a contest between sellers for the buyer's business, because 'competition is, in its very essence, a contest for trade.' *United States v. Standard Oil Co. of New Jersey*, D.C. E.D. Mo. 1931, 47 F.2d 288, 297; *Balian Ice Cream Co. v. Arden Farms Co.*, D.C. S.D. Cal. 1952, 104 F. Supp. 796, 801, *affirmed* 9 Cir., 1955, 231 F.2d 356, *certiorari denied* 350 U.S. 991, 76 S.Ct. 545, 100 L.Ed. 856. 'Competition * * * is a battle for something that only one can get; one competitor must necessarily lose.' *Sinclair Refining Co. v. Federal Trade Commission*, 7 Cir., 1921, 276 F. 686, 688, *affirmed* 261 U.S. 463, 43 S.Ct. 450, 67 L.Ed. 746. 'Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. *Atlas Building Products Co. v. Diamond Block & Gravel Co., supra*, 269 F.2d at page 954. See also *Whitaker Cable Corporation v. Federal Trade Commission*, 7 Cir., 1956, 239 F.2d 253." *Anheuser-Busch, Inc. v. F.T.C.*, 289 F.2d 835, 840 (7th Cir. 1961).

The Seventh Circuit reversed the F.T.C. finding of violation since "[t]he contest for beer sales was intensified", even though Anheuser-Busch's "[s]ales increased in St. Louis during the period of the price reduction . . ." 289 F.2d at 839. The Solicitor General did not seek review.

Anheuser-Busch has been quoted or cited in virtually every subsequent primary-line competition case:

> "It is clear that there can be no violation of the Robinson-Patman Act [in primary-line competition] if the price differential has no adverse effect on competition. *Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97, 103 (10th Cir.), *cert. denied*

414 U.S. 975, 94 S.Ct. 290, 38 L.Ed.2d 218 (1973); *Texas Gulf Sulphur Co. v. J. R. Simplot Co.*, 418 F.2d 793, 806 (9th Cir. 1969); *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 782 (10th Cir. 1964); *Anheuser-Busch, Inc. v. F.T.C.*, 289 F.2d 835, 840 (7th Cir. 1961); *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356, 368 (9th Cir. 1955), *cert. denied*, 350 U.S. 991, 76 S.Ct. 545, 100 L.Ed. 856 (1956)." *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 855, n.6 (9th Cir. 1977), *cert. denied* 439 U.S. 829 (1978).

The Third Circuit emphasized, "'A focus on detrimental effects *on competition* [in primary-line competition], rather than a concern with individual *competitors*, is fundamental to a reconciliation of the Robinson-Patman Act with overall antitrust policies.' F. Rowe, Price Discrimination Under The Robinson-Patman Act 130 (1962) (emphasis added)." Op. Pet. 38a.

"More than once, this Court has declared that the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws. *United States v. United States Gypsum Co.*, 438 U.S. 422; *Automatic Canteen Co. v. FTC, supra* at 74 [346 U.S. 61]." *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80, n.13 (1979).

There is no substantial question requiring review by this Court. This Court itself has in recent years so concluded. Three times since 1975, this Court has denied *certiorari* in cases from three different Circuits explicitly accepting the *Anheuser-Busch* injury to the *state of competition* standard for illegal price differences in primary-line Clayton/Robinson-Patman cases: *International Air Industries, Inc. v. American Excelsior Company*, 517 F.2d 714, 721 (5th Cir. 1975), *cert. denied* 424 U.S. 943 (1976); *Pacific Engineering & Production Co. of Nevada v. Kerr-*

McGee Corp., 551 F.2d 790, 798-799 (10th Cir. 1977), *cert. denied* 434 U.S. 879 (1977); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied* 439 U.S. 829 (1978).

B. Geographic Discrimination Has Been the Focus of Primary-Line Clayton/Robinson-Patman Liability

Hommel objects to the Third Circuit emphasis on the lack of geographic or territorial price discrimination by Ferro. Op. Pet. 44a-46a. The Third Circuit did not hold that *only* geographic price discrimination was actionable in primary-line competition under the Clayton/Robinson-Patman Act under all circumstances. It held that, in the fact context of this case, the lack of geographic or market discrimination was another facet of the record precluding a jury *inference* of predation by Ferro. Op. Pet. 48a-49a.

The Third Circuit noted that *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 690 (1967) upon which Hommel and the District Court had relied, was the classic geographic price discrimination proscribed by the Clayton Act. National baking companies had invaded the Salt Lake City local market of Utah Pie with lower prices than in their other markets and caused a deteriorating price structure in the local market. Op. Pet. 48a-49a. It was stipulated that Hommel's market—as Ferro's—was national and not local or geographic and there was no collapsing price structure in the frit industry. Op. Pet. 29a.

The Third Circuit cited and quoted the Congressional Record that the Clayton Act was designed to correct the unfair trade practice of companies " '[s]elling their goods, wares and merchandise *at a less price in the particular communities where their rivals are engaged in business*

than at other places throughout the country.'" Op. Pet. 44a-46a; emphasis supplied.

Corn Products Refining Co. v. F.T.C., 324 U.S. 726 (1945) does not hold to the contrary as suggested by Hommel. Pet. 10. Corn Products used a basing-point system of pricing with resulting different prices to competing customers in different geographic locations. Regardless of the plant from which the product was shipped, the delivered price included freight costs as if the shipment were made from one plant with a resulting distortion of the real freight costs. This Court rejected Corn Products' argument that §2(a) was directed "only at price discriminations between buyers at the same delivery points." This Court concluded: "The purchasers of glucose [from Corn Products] . . . are found to be in competition with each other, even though they are in different localities." 324 U.S. at 734. This was enough to condemn Corn Products' basing-point pricing, not at all involved here.

C. The Third Circuit Did Not Hold That in All Cases Sales Below Cost Were Irrelevant

Hommel distorts the Third Circuit decision to hold that the relationship of sale prices and costs is irrevelant in *all* situations in determining predatory intent.

The Third Circuit's conclusion on the relation of prices and costs was limited to the facts of this case after it had analyzed the state of competition in the frit industry:

> "*In such circumstances* [intense competition in the frit industry] we have grave reservations whether any sales prices below any cost formulation could, without more, be deemed indicative of predatory intent because our review of the record shows it to be barren

of any substantial lessening of competition or any tendency to create a monopoly caused by Ferro's discriminatory pricing." Op. Pet. 52a; emphasis supplied.[6]

D. Whether a Judgment Is Final Where Attorneys' Fees Are to Be Awarded Has Been Left to the Discretion of Each Circuit

Hommel argues that because Ferro's Motion for Judgment Notwithstanding the Verdict was not filed within 10 days after an Order was entered on the jury verdict, the most the Third Circuit should have done was to remand the case for a new trial. The Third Circuit has determined that where attorney's fees are to be awarded, there is no final judgment until such award. Op. Pet. 54a. Ferro's Motion *N.O.V.* was filed within the requisite 10 days after such a final order. Op. Pet. 53a.[7]

The purpose of the *n.o.v.* motion is to have the "[D]istrict Court first pass upon whether an error should result in a new trial or in a judgment finally ending the controversy." *Globe Liquor Co. v. San Roman,* 332 U.S. 571, 573 (1948). If the District Court has not had such an opportunity, an appellate court can only remand. Here, the District Court had that opportunity and exercised it. Pet. 6a.

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6. The Third Circuit extensively analyzed the Areeda and Turner and Williamson theories on inferences of predatory intent from "below-cost" pricing. Op. Pet. 46a-52a. Neither theory was applicable here "[i]n a non-geographic selective discriminatory pricing case when actual competitive harm has not been shown . . ." Op. Pet. 48a.

7. Rule 50(b) (F.R.Civ.P.) provides that an *n.o.v.* motion shall be filed "Not later than 10 days after entry of judgment . . ." "Judgment" is defined in Rule 54: it "includes a decree and any motion from which an appeal lies." Appeals only lie from "final decisions". 28 U.S.C. §1291.

There was no procedural impediment to the Third Circuit's mandating the entry of judgment for Ferro.

There is a split in the Circuits on whether all issues which might be presented on appeal, including attorneys' fees awards, should be decided by the District Court before there is a final appealable order. (Citations, Pet. 18).[8] No Circuit has certified a conflict although aware of the differences. It is a procedural issue left to the discretion of each Circuit.[9] Uniformity is not necessary. It is important only that trial practitioners and District Courts know the rule in their Circuits.

If this Court deems it appropriate to define "final" orders either on the narrow issue of attorneys' fees or on the many varieties of orders now being issued by District Courts in the ever-broadening scope of federal jurisdiction, it should be done prospectively and not retroactively to the detriment of a litigant who has complied with the particular Circuit's procedure.

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8. Since the filing of the Petition, the 10th Circuit has joined the 2nd, 3rd, and 5th Circuits in holding that there is no final order until attorneys' fees are awarded. *Black Gold Ltd. v. Rockwool Industries*, 1981-2 Trade Cases ¶64,390 (10th Cir. Dec. 1981). *Contra;* 6th and 7th Circuits.

9. "[t]he criteria [for a final judgment] set only very broad limits on the interpretation of judicial action and considerable scope is left for variation according to local custom and practice, properly so in a country as diversified and vast as ours." *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 243 (1957); Frankfurter, J. Dissenting.

CONCLUSION

The Petition for Certiorari should be denied.

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Petitioner's Reply Brief

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No. 81-1116

IN THE

Supreme Court of the United States

October Term, 1981

THE O. HOMMEL COMPANY,

Petitioner,

v.

FERRO CORPORATION,

Respondent.

REPLY BRIEF FOR PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

At Nos. 80-2962, 80-2723

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REPLY BRIEF FOR PETITIONER

I

There was ample evidence of an adverse effect on competition.

Ferro seeks to deny the applicability of Robinson-Patman to primary-line competition by quoting from *FTC v. Anheuser-Busch, Inc.* 363 U.S. 536 (1960), and italicizing this Court's reference to "secondary-line competition" (p. 7). This italicizing ignores the word "principally"—which certainly does not mean "exclusively"—in the preceding line, and also ignores this Court's statement that legislative expressions might be "merely description of the evil . . . rather than delineation of the outer reach of that section" (363 U.S. at 552-553). The idea that Robinson-Patman is pertinent only in secondary-line competition (p. 6) has no support in legislative history or precedent.

The legislative history of Robinson-Patman set forth in our brief (p. 6) is ignored by Ferro in its claim that this case has no precedent value (p. 3) because of the court's "assessment of the evidence" (p. 2). But that assessment started with the assumption that there is something in the statute which protects a competing wholesaler-seller but not a competing manufacturer-seller. Under the 1936 amendments, there is an adverse effect on competition if competition with the discriminator is injured; the amendments would be emasculated by a precedent limiting their effect to a wholesaler.

Ferro argues that there was no adverse effect on competition because "Hommel retained its market share" (p. 4). This claim is based on the fact that

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*Hommel has no parent company, subsidiary or affiliate.

Hommel had the same percentage of the market in 1977 as in 1973 (28a). But Ferro's discriminatory pricing started in 1966 (App. IV—333) and continued every year through 1977. The year 1973 has no significance except that it was the first year not barred by the statute of limitations. The fact that Hommel's percentage in 1977, the 12th year of the predatory pricing, was no worse than in 1973, the 8th year of that pricing, certainly does not show that Hommel "retained" its market share. Similarly, the fact that in the 12th year Ferro's percentage was less than in the 8th year does not show that Ferro's share "dropped."

The argument that Hommel's gross profits increased from 1973 to 1977 (p. 4) likewise considers only the 8th and 12th years of the predation. Further, this increase in gross profit was accomplished not by better sales but by a reduction in its sales force demanded by Hommel's economic situation.

The assertion that Hommel sold "much" of its output at unpublished prices (p. 4) has no support in the evidence.

Ferro italicized the argument that its discriminatory sales were "less than 2% of the total market sales" (p. 4). This is inaccurate: in 1976 Hommel lost sales of over 4,000,000 pounds (App. IV—396-399) out of industry sales of 111,000,000 pounds (27a). More important, losing sales of 4,000,000 pounds means that Hommel lost 40% of the business that customers would otherwise have given it (28a). In *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), the discriminatory sales involved the sale of pies only in the Salt Lake City market out of the entire United States, surely a percentage even less than 2%.

The decision of the Court of Appeals establishes an important and dangerous precedent. As Ferro argues (p. 10), the court rules that if price discrimination is practiced nationally rather than in a limited geographic area, then predation cannot be inferred from sales below cost. So, if the decision is allowed to stand, price discrimination is legal if done in more than one city.

II

Federal Rules should be interpreted uniformly.

Ferro concedes (p. 13) that there is a conflict among the courts of appeals as to whether a judgment is final in cases where the amount of mandatory attorneys' fees is left open. But Ferro argues that each court of appeals should be free to do what it wants and that uniformity is not necessary (p. 13).

But 9 Moore's *Federal Practice*, ¶3, states with regard to the Federal Rules of Appellate Procedure:

> "For the first time, following the effective date, a uniform appellate procedure is applicable in all the Courts of Appeals, instead of the disparate rules which each court of appeals had previously promulgated to govern its appellate practice."

And Moore refers (¶2-10) to the 1967 report of the Committee on Rules of Practice and Procedure submitting a definite draft of "uniform rules" and the complete draft of "uniform appellate rules". If the same rule is to be interpreted differently in different circuits, there is no uniformity.

Nor did Ferro comply "with the particular Circuit's procedure" (p. 13) when it failed to file its motion. At that time the Third Circuit held the judgment to be final: *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, *cert. denied*, 429 U.S. 825 (1976).

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